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Taxing Housework

NANCY C. STAUDT*

INTRODUCTION

Many features of the Federal Income Tax Code reflect the assumption that our society is composed of heterosexual married couples, with men occupying the "public" sphere and women occupying the "private" domestic sphere.¹ Social security benefits funded through the payroll taxes, for example, offer spousal benefits only to legally married couples, and only heterosexual couples can obtain the tax benefits under the joint return provisions. Once married, many provisions encourage women to undertake a traditional caretaking role in the home to the exclusion of work in the paid labor force. By providing only a limited childcare subsidy, for example, the Tax Code provides financial incentives for women to work in the home after bearing children.²

It is not surprising that the tax laws reflect an image of men as public actors earning a wage in the market, and that the laws assume women do not and should not have such roles.³ Congress devised the Tax Code in 1913 when many perceived waged labor as a male endeavor and household labor as a distinctly female activity associated with the social, but not economic, mainte-

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1. Commentators who note problematic gender biases and propose tax reform initiatives also seek to encourage traditional family structures. See, e.g., Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1033, 1040-41 (1993) (arguing Congress should lower married women's tax rates, thereby encouraging women both to get married and to participate in the waged labor force); see also Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1392 (1975) (noting Tax Code codifies our social mores); Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEXUALITY: REV. LESBIAN & GAY LEGAL ISSUES 97 (1991) (noting that Tax Code provisions are intended to acknowledge and support heterosexual relationships but not same-sex relationships).

2. See, e.g., McCaffery, *supra* note 1, at 1005-10; see also DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 20-21, 41, 44 (1989) (noting federal and state laws maintain public/private divide and relegate women to their "maternal mission").

3. Not only does the Tax Code assume the husband has a salaried position in the labor force, but it also assumes and encourages the wife to be financially dependent on her husband by performing unwaged labor for the household. See, e.g., I.R.C. § 151(b) (1994) (treating spouses as dependents for joint tax return purposes); see also Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1165, 1177 n.235 (1986) (suggesting women are "victims of 'forced community' due to their economic and legal dependence on men and the constraints of the social and sexual roles thought to be appropriate for them").

nance of the family.⁴ Many commentators have noted these underlying assumptions and the manner in which the Tax Code contributes to women's economic insecurity by encouraging reliance on men for financial support. Accordingly, tax analysts almost uniformly propose tax reform intended to enable women to move more easily into the market. Many argue that by lowering the tax costs associated with participating in the waged labor market, women will be encouraged to substitute marketwork for housework, thereby gaining access to the wages and benefits tied to traditional market labor.⁵

The prevailing "market-oriented" approach to women's economic subordination is based on the belief that housework can be both isolating and demoralizing. These tax analysts argue that waged labor in the market promotes self-reliance and individual success, while unwaged labor in the home might leave women disempowered socially and individually.⁶ In short, tax reformers have

4. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (reflecting notion that women's mothering responsibilities require them to depend on men for economic subsistence); cf. Reva B. Siegal, *Home at Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1092 (1994) [hereinafter Siegal, *Home at Work*] (noting prevailing view of women as unproductive throughout history); Reva B. Siegal, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1994) [hereinafter Siegal, *The Modernization of Marital Status Law*] (noting that judges have historically viewed women's labor as being motivated by love and duty rather than economic need).

Although many women did work primarily in the home in 1913, their work was often paid and, therefore, key to the family's economic survival. Women in low-income families, for example, were frequently resourceful contributors to the family economy. They often worked with other women and children embroidering and sewing to earn a wage. See generally EILEEN BORIS, *HOME TO WORK* 81-122 (1994). Women of color also traditionally have had extremely high levels of market participation despite the prevailing belief that women worked only in the private sphere while men worked in the public market. See TERESA AMOTT & JULIE MATTHAEI, *RACE, GENDER & WORK* 303 (1991) (noting that many women of color have participated in the market at high levels); MARY ROMERO, *MAID IN THE U.S.A.* 81-82 (1992) (discussing Mexican and Chicano women's public and private roles, which are both equally important to the family's economic survival); cf. Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemmas of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 892-95 (1989) (discussing belief that law, not surprisingly, reflects a male image and men's images of women).

5. See, e.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 69-71 (1972) (criticizing childcare provisions that discourage women's waged labor); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 32, 42-43 (1980) (arguing that joint return provisions must be repealed to enable women's greater market participation); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 602, 657 (1993) (discussing equality in terms of women's market participation and proposing tax reform intended to provide market incentives); McCaffery, *supra* note 1, at 1029, 1035 (same); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 378-94 (1994) (proposing individual filing system to ensure neutrality toward women's market and nonmarket roles); Note, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197, 198-99 (1988) (arguing that Tax Code discourages women's efforts to attain financial independence in market); Note, *The Case for Mandatory Separate Filing by Married Persons*, 91 YALE L.J. 363 (1981) (same). But see Jonathan Foreman, *Beyond President Bush's Child Tax Credit Proposal: Towards a Comprehensive System of Tax Credits to Help Low-Income Families with Children*, 38 EMORY L.J. 661, 688-89 (1989) (proposing that women have access to childcare whether or not they participate in market).

6. See, e.g., McCaffery, *supra* note 1, at 1051-52.

focused on the perceived oppressive nature of women's caring and nurturing role in the home and the possibility of using tax incentives to enable escape from this devalued role.

The market-oriented approach to women's equality and liberation acknowledges the material costs associated with performing unpaid labor and the role it plays in preventing women from obtaining the level of wages and benefits that men receive in the market. To remedy this problem, the market-oriented scholars have devised practical solutions that would, in effect, provide women with greater returns on their market labor. Although this has worthy distributional effects, focusing only upon women's work outside of the home ignores important aspects of women's lives. Indeed, by failing to acknowledge the productive nature of women's work in the home, tax scholars might contribute to the false and gendered distinction between paid work outside of the home and unpaid work inside of it.

Additionally, market-oriented incentives will not enable women to choose freely between caretaking responsibilities in the home and a career in the market. In 1994, the majority of women of all races and classes were working in the market; nevertheless, women continued to be responsible for seventy to eighty percent of housework responsibilities.⁷ Providing market opportunities, therefore, does not cause a corresponding decrease in the level of women's housework. The market-oriented approach to tax policy also fails to acknowledge that many women do not seek to exchange their household responsibilities for a greater level of market participation. Many women of color, for example, believe that in light of health hazards disproportionately suffered by communities of color, caretaking services that ensure the family's survival can be personally satisfying and politically important.⁸

Characterizing household labor as demeaning, isolating, and oppressive, thus, ignores the valuable and productive aspects of the labor that many women, perhaps women of color in particular, find important.⁹ The only general assumptions that can and should be made concerning nonmarket labor are that (1) women, and not men, do the work, and (2) this work does not entitle women to wages or other economic benefits tied to traditional market employment.

In this article, I argue that rather than maintaining the invisibility of housework, feminists should encourage society to value the productive and political nature of women's labor both in the home and in the market. A recognition of

7. David H. Demo & Alan C. Acock, *Family Diversity and the Division of Domestic Labor: How Much Have Things Really Changed?*, 42 FAM. REL. 323, 326 (1993); see also *infra* notes 34-57 and accompanying text.

8. See *infra* notes 58-73 and accompanying text.

9. Commentators who take an essentialist approach to women's subordination tend to make sex-based generalizations about all women, regardless of the race, class, and sexuality differences among women. Many scholars have argued this universalizing approach works to the benefit of some women while marginalizing others. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 591-95, 602-05 (1990) (discussing marginalizing effects of Catharine MacKinnon's and Robin West's theories of sexual difference).

the importance of women's work, regardless of the setting, would more accurately reflect women's valuable contributions to the economy. Once formally recognized, society is likely to value nonmarket housework activities similarly to market activities, thereby entitling women to social welfare benefits that are currently tied only to waged labor in the market.

In Parts I and II of this article, I briefly explain how the Federal Income Tax Code distinguishes between market labor and household activities, and the rationale underlying this distinction. I then argue that while the distinction is grounded on fairness and administrative concerns, the treatment between market and nonmarket labor has a much greater effect on women than men because of the current gendered division of labor within the household. Tax scholars have previously noted that the current tax structure, in effect, encourages women to perform more housework than if the economic gains of all labor were taxed;¹⁰ however, they have failed to acknowledge that exempting household labor from the tax base also denies women important social welfare benefits directly tied to taxation. Thus, in addition to the unfortunate behavioral effects, nontaxation of women's household labor also causes women to lose important economic benefits, such as social security, disability, and medicare benefits.

Feminist tax scholars, who focus primarily on the behavioral bias of the Tax Code, have developed a market-oriented response to mitigate the bias: tax incentives intended to enable women to move more easily out of the home and into the market. Part III describes and then critiques the prevailing market-oriented approach, an approach based on the importance of marketwork over housework. While the tax incentives developed to encourage women's market participation will benefit many women, the proposed tax reforms will have only a marginal effect on women's labor decisions and often fail to account for race and class complexities. Focusing solely on market labor as a means to economic independence, for example, fails to acknowledge that many women who currently participate in the market remain economically vulnerable. Thus, simply providing women with the option to move out of the home and into the market will not necessarily ensure women's economic security. In addition, because many women do not view household labor as oppressive or demeaning, encouraging market participation will not always operate to empower women and could result in compounding existing race and class oppression.

Part IV proposes a solution that would value both market and nonmarket labor. This Part examines the possibility of valuing and taxing nonmarket labor in the same manner as market labor. Congress could broaden the tax base to include the value of women's household labor, thereby subjecting the benefits of housework to the same tax structure as waged labor. Because taxation of both market and nonmarket labor challenges the market/nonmarket distinction defended by generations of tax scholars, I first examine the traditional objections

10. See *infra* notes 72-85 and accompanying text (explaining traditional view that market/nonmarket distinction discourages women's market labor).

to taxation. Valuation, liquidity, and commodification problems have historically prevented taxation of nonmarket activities. Although these problems certainly pose difficulties, I argue that they no longer are insurmountable. The argument for taxation of nonmarket housework, however, remains uneasy. On the one hand, because social security, disability, and medicare benefits are tied to taxation, taxation would ensure that women have independent social welfare benefits based on the economic value of their own labor in the home. Taxation, on the other hand, would also impose an additional financial burden on women in the form of increased tax liability. Accordingly, Part V considers devices by which this adverse economic impact could be diminished. Part VI considers the tax policy implications of implementing the proposed tax.

This article is, therefore, an exploration of the previously unexamined advantages and the traditionally overstated disadvantages of taxing household labor. Taxing household labor is not an easy answer to women's economic marginalization, but it is a far more plausible solution than has been recognized, and one with some distinct advantages over other tax reform proposals.

I. THE TAX CODE'S DISTINCTION BETWEEN MARKET AND NONMARKET LABOR

A. DEFINING TAXABLE INCOME: THE MARKET PROVISIO

Congress broadly defined the term "taxable income" in the Tax Code in an attempt to subject the material benefits of all property and services to taxation.¹¹ The extensive list of taxable items in section 61 of the Tax Code and the corresponding Treasury Regulations demonstrate that Congress intended to subject all income, even income not immediately available to the taxpayer, to taxation.¹² Wages and retirement benefits provided by an employer to an employee, for example, are subject to taxation. In addition to income received in the *formal market*, goods and services obtained in the *informal market* such as those received in a barter transaction with a neighbor are taxable.¹³ Indeed, Congress even taxes income derived on the *illegal market* through illicit

11. I.R.C. § 61 (1994); *Collins v. Commissioner*, 3 F.3d 625, 629-30 (2d Cir. 1993) (holding § 61 of Code must be broadly interpreted).

12. I.R.C. § 61 (1994) (listing 15 items including compensation for services, interest, rents, royalties, dividends, alimony and separate maintenance payments, annuities, pensions, and income from discharge of indebtedness that must be included in taxpayer income); Treas. Reg. § 1.61-14 (1994) (listing additional miscellaneous income including punitive damage awards, prizes, grants, and scholarships).

13. Treas. Reg. § 1.61-2(d)(1) (1994) (explaining method for determining gain in barter transaction). Barter transactions have been a source of controversy. *See, e.g.*, *United States v. Cartwright*, 411 U.S. 546, 551 (1973) (holding that noncash income is taxed at fair market value, which is defined as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts") (quoting Treas. Reg. § 20.2031-1(b)); *Collins*, 3 F.3d at 633 (holding that noncash compensation of racing tickets is taxed at retail value); *Joslin v. United States*, 666 F.2d 1306, 1307 (10th Cir. 1981) (holding that noncash compensation of silver dollars is taxed at fair market value, not face value); *Wills v. Commissioner*, 411 F.2d 537, 543 (9th Cir. 1969) (holding that property received as award is taxed at fair market value at time of receipt).

activities, including embezzled monies and profits from the sale of illegal drugs.¹⁴ In numerous contexts, courts have recognized Congress's intent to exert "the full measure of its taxing power"¹⁵ by requiring taxpayers to include all economic gains, regardless of source or form, within gross income unless Congress explicitly exempts a particular item from taxation.¹⁶

Despite this extremely broad definition of income, there exists one limitation. Income is subject to taxation only if obtained in a *market* transaction. Although the courts and Congress have not explicitly exempted income from household activities, there is a widely held but unstated distinction between gains received in the market context and gains received in the family context.¹⁷ Gains obtained in the formal, informal, and illegal markets are all taxable, while the economic benefits received from self-supplied services or services from a family member are exempt from taxation.¹⁸ This market proviso imposes different tax burdens on taxpayers who obtain similar goods and services. For example, a household is not taxed on the value of childcare services provided by a family member; however, the value of identical services provided by a neighbor or a childcare center would produce a tax burden.¹⁹

Many commentators have noted the paradox of taxing the profits of domestic labor performed in the market while ignoring the value of identical services

14. See, e.g., *James v. United States*, 366 U.S. 213, 220 (1961) (holding that embezzled funds constitute taxable income). See generally Ann L. Iijima, *The War on Drugs: The Privilege Against Self-Incrimination Falls Victim to State Taxation of Controlled Substances*, 29 HARV. C.R.-C.L. L. REV. 101, 101-36 (1994) (discussing state and federal laws imposing a tax on gains received in illegal drug and alcohol sales).

15. *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 429, 432-33 (1955) (noting sweeping scope of § 61 of Tax Code and holding that punitive damages for fraud in antitrust litigation is taxable).

16. *Id.* The courts have struggled with the definition of gross income and have changed the definition over time. Compare *Commissioner v. Wilcox*, 327 U.S. 404, 408-09 (1946) (holding that illegally procured gains are not taxable) and *Eisner v. Macomber*, 252 U.S. 189, 207 (1920) (holding that income is gain derived from capital, from labor, or from both combined, "provided it be understood to include profit gained through a sale or conversion of capital assets" (quoting *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185 (1918))) with *Commissioner v. Kowalski*, 434 U.S. 77, 82-83 (1977) (holding that income is all gains except those specifically exempted); *James*, 366 U.S. at 218 (holding that unlawful gains are taxable) and *Glenshaw Glass Co.*, 348 U.S. at 430-31 (abandoning capital-labor formulation of gross income).

17. Although Congress has not explicitly exempted income from nonmarket activities from tax, this is the accepted definition of income. See Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1608 (1977) (noting that benefits from household services and home ownership are tax free).

18. The value received from nonmarket services is called "imputed income." When the services are performed in exchange for cash or benefits from another person, the resulting income is not tax free. See Zelenak, *supra* note 5, at 356 n.85 (discussing women's household labor).

The market/nonmarket labor dichotomy is frequently mistaken for the labor/leisure dichotomy. The home is generally perceived as an escape from the work and a haven for leisure activities and emotional warmth. Indeed, women who work primarily in the home are often perceived as enjoying free time not available to women in the market. The labor performed in the home is not seen as work, but as a "labor of love." ROMERO, *supra* note 4, at 21; see also ANN GAME & ROSEMARY PRINGLE, *GENDER AT WORK* 127 (1983).

19. Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240, 1248-49 (1980) (stating that cohabitants must pay tax on exchanged services).

performed for one's own family. For example, in 1920, A.C. Pigou expressed concern that only services performed by women for a wage counted toward the gross domestic product.²⁰ Acknowledging the value of women's labor, public finance theorists, tax analysts, and economists have also noted that an ideal or comprehensive income tax should contain a tax on nonmarket activities.²¹ Indeed, Richard Posner in his essay, *Conservative Feminism*, argues that tax and feminist theorists should consider the idea of taxing household labor, in light of the distributional and behavioral incentives of nontaxation.²² Despite the theoretical support for taxing housework, no adjustment to the tax structure has ever been seriously considered, and the tax policy literature continues to reflect a universal acceptance of the market/nonmarket binarism as applied to housework.²³

The primary objection to taxation involves the perceived administrative difficulties of measuring and valuing household labor. The extent of the labor is potentially endless: childcare, gardening, and balancing a checkbook all provide a benefit to a family member. Because no convenient stopping place exists, tax analysts have argued that any attempt to tax nonmarket activities is "clearly hopeless."²⁴ Additionally, drawing the line between leisure and productive activities is difficult, if not impossible.²⁵ Would tending the vegetable garden,

20. A.C. PIGOU, *THE ECONOMICS OF WELFARE* 33 (4th ed. 1952) (noting that "if a man marries his housekeeper or his cook, the national dividend is diminished"); see also Harold C. Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386, 390 (1932) (noting paradox that identical services are valued in public sphere but not private sphere).

21. See, e.g., RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 365 (1980); see also sources cited *infra* note 23.

22. Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 193-94.

23. See, e.g., WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 121 (10th ed. 1994) (arguing taxation of household services is "patently unsound"); MUSGRAVE & MUSGRAVE, *supra* note 21, at 365 (taxing imputed income would be ideal (if impractical) solution on efficiency and equity grounds); HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 53 (1938) (arguing that taxation of nonmarket activities is "clearly hopeless"); Glenn E. Coven, *The Decline and Fall of Taxable Income*, 79 MICH. L. REV. 1525, 1548 (1981) (arguing that conceptual and practical difficulties prevent taxing self-performed services); John F. Due, *Personal Deductions*, in *COMPREHENSIVE INCOME TAXATION* 37, 41 (Joseph A. Pechman ed., 1977) (arguing that taxation of imputed income "is so repugnant . . . that it is unlikely to be considered seriously"); Louise Dulude, *Taxation of the Spouses: A Comparison of Canadian, American, British, French and Swedish Law*, 23 OSGOODE HALL L.J. 67, 116-17 (1985) (taxing imputed income not feasible in light of fact that income in-kind is not worth very much and political problems of getting proposal through); McIntyre & Oldman, *supra* note 17, at 1618 (stating that taxation of imputed income is universally acknowledged to be unfeasible); Charles R. O'Kelley, Jr., *The Parenting Tax Penalty: A Framework for Income Tax Reform*, 64 OR. L. REV. 375, 389-97 (1986) (advocating taxation of household services but at same time supporting complete credit for the tax); Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 83 (1990) (suggesting taxation of imputed income would introduce notions repugnant to democratic society); Zelenak, *supra* note 5, at 404 (suggesting that tax on imputed income creates terrible contortions in Tax Code).

24. SIMONS, *supra* note 23, at 53; see also McIntyre & Oldman, *supra* note 17, at 1618.

25. Rather than attempting to distinguish between labor and leisure as economists have recently begun to do, commentators often list silly examples of activities that produce a benefit but would most likely not be taxed regardless of the breadth of the tax base. See, e.g., McIntyre & Oldman, *supra* note 17, at 1610-12 (noting that if Congress taxed all nonmarket activities it would struggle with valuing activities such as getting up in morning and chewing food).

for example, be counted as a chore undertaken for the family's economic gain or as a nontaxable leisure activity?

Moreover, even if labor and leisure could be distinguished, many argue that the value of the labor performed outside of the market is impossible to quantify because it is not measured according to objective market standards.²⁶ Unlike waged labor, the standards of performance for household labor are obscure and set by the family members themselves. Consequently, tax scholars argue that Congress could not accurately determine the value of household services without an unparalleled governmental intrusion into taxpayers' private lives.²⁷

Additionally, some commentators argue that taxation of nonmarket gains might create unfair economic hardship for taxpayers.²⁸ Because household labor does not produce cash or property that could be exchanged for cash, taxpayers may not have the resources to pay the additional tax burden. Consequently, tax analysts argue that the benefits of services should only be subject to tax when taxpayers voluntarily convert their labor into a marketable form.²⁹ In many cases, taxpayers can only pay an income tax after entering the market, and Congress's recognition of this limitation reflects traditional notions of tax fairness.

Finally, some commentators take the position that if Congress were to tax household labor, there is a danger that society would commodify women, who perform the vast majority of housework, by valuing them by the dollar value that Congress imputes to their labor.³⁰ Conceptualizing household labor as simply an economic endeavor would arguably ignore important aspects of the work. Mothering activities, for example, include not only childcare and meal preparation, but also "caring, compassion, and connection."³¹ Some commentators worry that by valuing housework in purely monetary terms, it will lose much of its value and become a mere economic enterprise. Additionally, because the value of women's household labor and a market wage are incommensurable, some commentators argue that it would be entirely impossible to value

26. SIMONS, *supra* note 23, at 51-52; Michael J. McIntyre & Oliver Oldman, *Treatment of the Family*, in COMPREHENSIVE INCOME TAXATION, *supra* note 23, at 205, 224.

27. See KLEIN & BANKMAN, *supra* note 23, at 121-22 (explaining administrative difficulties associated with taxation of women's household labor and concern that taxation would cause governmental intrusion into our private lives).

28. See Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly into an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 838 (1979).

29. See *id.*; McIntyre & Oldman, *supra* note 17, at 1612.

30. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing commodifying effects of using market terminology to analyze nonmarket activities); see also Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 378 (1989) (arguing that imputed income is not and should not be taxed because of "appropriate reluctance to commoditize nonmarket transactions"); Kelman, *supra* note 28, at 838-39 (noting taxation of nonmarket services would force taxpayers to commodify their labor).

31. Nel Noddings, *Ethics from the Standpoint of Women*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 160, 168 (Deborah L. Rhode ed., 1990) (criticizing Marxist viewpoint that all labor should be valued in economic terms).

women's household labor in monetary terms.³²

This article reconsiders whether the difficulties with valuation, liquidity, and commodification continue to be sufficient reasons for Congress to leave household activities untaxed. Upon a close examination of these long-held objections, I argue that the case against taxation of women's household services has been overstated, and the potential benefits of taxation have been virtually ignored.³³ Although Congress may, nevertheless, decide that good tax policy requires household services to be exempt from taxation, I demonstrate why the traditional objections to taxation are no longer persuasive.

Before discussing the possibility of taxing household labor, I explain the way in which its nontaxation contributes to women's economic vulnerability, taking into consideration aspects ignored by the current tax literature. I then describe the problems associated with the market-oriented proposals developed to offset the economic consequences of women's responsibility for housework. Although this approach acknowledges that women undertake the bulk of the housework, it renders the housework invisible by focusing solely on the promotion of women's market labor. Finding that these proposals might contribute to the gendered notion of work, I turn to the possibility of recognizing the value of household labor through tax reform.

B. SEX AND GENDER DIFFERENCES REFLECTED IN THE MARKET/NONMARKET LABOR DICHOTOMY

1. The Division of Labor in the Household Along Gender Lines

Because both men and women are capable of performing household labor, Congress's failure to tax housework appears to be sex-neutral. The exclusion of housework from the tax base, however, affects women to a much greater extent than men. First, women spend significantly more time on household chores, performing the bulk of the family's household labor. Moreover, while women generally consider both market and household labor important, interrelated aspects of family maintenance, men are more likely to perceive this labor as dichotomous and often consider household labor to be of secondary or no importance.³⁴ Women permit and even welcome the intrusion of household responsibilities upon market responsibilities.³⁵ In contrast, men tend to let market activities spill over into what women perceive as "family time."³⁶

Even men who perceive household labor as valuable and productive tend

32. *Id.*

33. Most taxpayers would find it offensive that the housewife should pay a tax when she did not earn any money. Thuronyi, *supra* note 23, at 84.

34. JULIE A. MATTHAEI, AN ECONOMIC HISTORY OF WOMEN IN AMERICA 304-07 (1982).

35. See *infra* notes 58-73 and accompanying text.

36. Rachel Kahn-Hut et al., *Home Work and Marketwork: Systematic Segregation, Introduction to WOMEN AND WORK: PROBLEMS AND PERSPECTIVES* 85 (Rachel Kahn-Hut et al. eds., 1982) (discussing how men separate home work from market labor while same is not true for women).

only to undertake household jobs that do not interfere with their market labor.³⁷ Men perform household tasks that can be completed at any hour of the day and those that can be easily postponed, such as fixing the car or mowing the lawn.³⁸ Women, on the other hand, undertake responsibilities that often prove inconsistent with a full-time market position, such as childcare and meal preparation.³⁹

Sociological studies indicate that despite labor-saving appliances and women's move into the market, the number of hours women work in the home has remained constant. On average, women perform approximately fifty hours of household labor per week.⁴⁰ Although the precise number of hours is often closely tied to a woman's marital status, the number of children in the family, and the woman's level of participation in the waged labor force, time-use studies uniformly indicate women perform approximately seventy to eighty percent of all household chores.⁴¹ Consequently, women often have two full-

37. Although men in most families fail to perform significant amounts of household labor, men who are high wage earners are particularly unlikely to undertake household labor. *See generally* JANE C. HOOD, *BECOMING A TWO-JOB FAMILY* 11 (1983); JOSEPH H. PLECK, *WORKING WIVES/WORKING HUSBANDS* 27-52 (1985).

38. Demo & Acock, *supra* note 7, at 325 (stating that women undertake chores such as preparing meals, washing dishes, and cleaning the house, while men perform jobs like car maintenance).

39. *Id.*

40. JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 86-87 (1991); *see also* Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1598-99 (1991) (citing several time-use studies finding women work significantly more than men in home); Katharine Silbaugh, *Turning Labor into Love: The Law of Housework* (Jan. 16, 1996) (unpublished manuscript, on file with *The Georgetown Law Journal*) (providing detailed breakdown of the number of hours men and women work in the home and in the market).

41. *See* EUSTON QUAH, *ECONOMICS AND HOME PRODUCTION* 213 (1993) (noting women account for about 77% of household production); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 565 (1990) (noting child care is only portion of caretaking services women provide; the elderly receive care for 18 years while children are cared for on the average 17 years); *see also* BARBARA R. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* 261-69 (1986) (noting that irrespective of employment status women retain primary responsibility for housework); SARAH FENSTERMAKER BERK, *THE GENDER FACTORY: THE APPORTIONMENT OF WORK IN THE AMERICAN HOUSEHOLD* (1985) (same); PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT, AND GENDER: A SOCIAL, ECONOMIC, AND DEMOGRAPHIC VIEW* 94-99 (1986) (integrating individual and structural views to explain behavior of individuals with respect to housework); MICHAEL GEERKEN & WALTER GOVE, *AT HOME AND AT WORK: THE FAMILY'S ALLOCATION OF LABOR* (1983) (using utility maximization model to develop unified theory of work allocation within a family); EVELYN NAKANO GLENN, *ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE* 221-25, 235-37 (1986) (discussing Japanese women's role both in home and in waged labor market); PATRICIA ZAVELLA, *WOMEN'S WORK AND CHICANO FAMILIES: CANNERY WORKERS OF THE SANTA CLARA VALLEY* 130-33, 136-42 (1987) (noting that women with seasonal wage work retain primary responsibility as housekeepers); Donna H. Berardo et al., *A Residue of Tradition: Jobs, Careers, and Spouses' Time in Housework*, 49 J. MARRIAGE & FAM. 381, 388 (1987) (same); Julie Brines, *Economic Dependency, Gender, and the Division of Labor at Home*, 100 AM. J. SOC. 652, 682 (1994) (noting the more a husband relies on his wife for economic support, the less housework he does); Demo & Acock, *supra* note 7, at 326 (noting that mothers report spending between 40 and 44 hours per week performing household chores); Nona Glazer, *Everyone Needs Three Hands: Doing Paid and Unpaid Work*, in *WOMEN AND HOUSEHOLD LABOR*, 249, 261-68 (Sarah Fenstermaker Berk ed., 1980) (noting many women are in waged labor force because of need but still retain responsibility for household chores); Heidi I. Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of*

time jobs—one waged job in the market and another unwaged job in the home. Studies indicate that women who perform these dual roles in the market and in the home sleep less, enjoy less leisure, and work far longer hours than the average man.⁴²

Low-income women, who typically lack the resources needed to purchase items such as childcare assistance and meals outside the home, are particularly likely to have a double workday. Although women's dual roles in the market and home have only recently gained widespread attention, low-income women have suffered the "doubleday" syndrome for decades.⁴³ Even middle-income women able to afford childcare assistance often do not escape significant burdens associated with working in the home. For example, the mother generally employs, schedules, and instructs the hired caregiver.⁴⁴ Additionally, although full-time day care can alleviate some responsibility for household tasks, women must still care for sick children and elderly parents.⁴⁵ Even in role-reversed families in which the mother is the primary wage-earner and the father is the primary caregiver, women often retain responsibility and assert authority over childcare decisions.⁴⁶

There exists a vast literature that discusses the underlying cause for the gender-based division of labor within the household. Feminists seeking to understand the division of labor often look to biological, structural, and psycho-

Housework, 6 SIGNS 366, 385-86 (1981) (citing 1960 studies that indicate that time spent on household labor does not vary with class, race, and ethnicity); Ziarat Hossain & Jaipaul L. Roopnarine, *Division of Household Labor and Childcare in Dual-Earner African-American Families with Infants*, 29 SEX ROLES 571 (1993) (finding African-American fathers involved in household tasks but women still overwhelmingly responsible for performing childcare); Joann Vanek, *Household Work, Wage Work, and Sexual Equality*, in WOMEN AND HOUSEHOLD LABOR *supra* at 275, 277 (noting regardless of employment status women are responsible for household labor).

42. GLENN, *supra* note 41, at 221-25, 235-37 (discussing women's desire for their husbands' help with household chores); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 85-87 (1989) (noting stress from work-family conflicts is result of inequitable burdens placed on women by responsibilities at work and at home, and because of the inflexibility of employment schedules); Williams, *supra* note 40, at 1599; *see also* Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987) (stating that women's hedonic lives matter).

43. ROMERO, *supra* note 4, at 18 (noting that Chicano women have worked a "doubleday" for generations); AMOTT & MATTHAEI, *supra* note 4, at 138-39 (citing several studies indicating immigrant women and women of color have worked both in and out of home simultaneously).

44. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1051 (1994).

45. BARBARA WILLER ET AL., THE DEMAND AND SUPPLY OF CHILD CARE IN 1990: JOINT FINDINGS FROM NATIONAL CHILD CARE SURVEY 1990 AND A PROFILE OF CHILD CARE SETTINGS 28 (1991) (noting that 35% of working mothers reported one of their children was sick on a work day in the preceding month).

46. *See* Malin, *supra* note 44, at 1051 (stating that women exercise power regarding childcare decisions regardless of whether or not they work); Graeme Russell, *Problems in Role-Reversed Families*, in REASSESSING FATHERHOOD: NEW OBSERVATIONS ON FATHERS AND THE MODERN FAMILY 161, 163-64 (Charlie Lewis & Margaret O'Brian eds., 1987) (noting many mothers in reversed-role families nevertheless retain greater responsibility than fathers for "decision-making, planning, monitoring and anticipating" children's needs).

logical influences (or some combination of all three). Robin West and Mary Becker have argued that biological differences make women better suited for caring and nurturing responsibilities.⁴⁷ While feminists who focus on biological differences do not conclude that motherhood is the natural destiny for all women, they do acknowledge the physically intense experience associated with pregnancy, childbirth, and nursing, which only women are capable of experiencing.⁴⁸ This biological difference has prompted Professors West and Becker to argue that recognizing, valuing, and enabling women to experience these connections without social or economic consequences could empower women.⁴⁹ Un-

47. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 133 (1992) [hereinafter Becker, *Maternal Feelings*] (noting that women's subjective experience must be viewed with acceptance and respect); West, *supra* note 42, at 81-82 (same). Authors in many disciplines have noted that women's biological roles create a foreseeable period of disability for working women at relatively early stages in their careers causing a lasting effect throughout their time in the labor force. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 14-37 (1981) (noting that women's inherent desire for children and concern for their welfare explains sexual division of labor within households); Victor R. Fuchs, *Women's Quest for Economic Equality*, 3 J. ECON. PERSP. 25, 38-39 (1989) (arguing that on average women have stronger demand for children than men do and have more concern for children after they are born, causing women to suffer economic disadvantages under current tax policy); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154, 2159-79 (1994) (arguing that if women are to achieve equality with men in workforce, problem of pregnancy must be reconceptualized to enable much more economic protection); see also *In re Baby M.*, 537 A.2d 1227, 1261 (N.J. 1988) (holding that significant mother-child bond and lesser, if any, father-child bond counsel against placing custody in father).

48. Sociobiologists have also focused on women's biological connection with children. See, e.g., Herma Hill Kay, *Perspectives on Sociobiology, Feminism, and the Law*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 31, at 74, 82 (noting sociobiologists argue that woman's genetic bond with her child ensures the child's survival that the less certain paternal bond is unable to guarantee). Unlike feminists, some sociobiologists argue that it is women's natural biological function to reproduce and care for children, making the sexual division of labor within the home also biologically driven. RICHARD DAWKINS, THE SELFISH GENE 152-53 (1976); EDWARD O. WILSON, ON HUMAN NATURE 33 (1979); EDWARD O. WILSON, SOCIOBIOLOGY 159 (1980); see also ALLISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983) (describing sociobiological view of sexual division of labor and feminist criticism of view). Sociobiologists argue not only that women are biologically destined to undertake a household role, but that "even with identical education and equal access to all professions, men are likely to continue to play a disproportionate role in political life, business and science." Ruth Hubbard, *The Political Nature of Human Nature*, in THEORETICAL PERSPECTIVES ON HUMAN DIFFERENCE, *supra* note 31, at 63, 72 (quoting Edward O. Wilson, *Human Decency is Animal*, N.Y. TIMES, Oct. 12, 1975, (Magazine), at 38, 50).

49. See *supra* note 47; see also Richard A. Epstein, *Some Reflections on the Gender Gap in Employment*, 82 GEO. L.J. 75, 81 (1993) (arguing any systematic study of women and employment must take into account biological pressures); Finley, *supra* note 3, at 1139 ("I sense that we will have lost something very fundamentally human in such a world of no 'real' differences. My sense of loss stems from a feeling that I as a woman want to be able to revel in the joy and virtually mystical specialness of having a baby."); Virginia Held, *Birth and Death*, in FEMINISM AND POLITICAL THEORY 87, 87 (Cass R. Sunstein ed., 1990) (arguing that giving birth should not be viewed as "essentially natural," and noting that women's reproductive and nurturing capabilities could be conceived as a source of "human power"). But see Gillian K. Hadfield, *Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 GEO. L.J. 89, 97 (1993) (noting that there is no clear demonstration that women possess comparative biological advantage with respect to household labor).

like some sociobiologists, feminists that have focused on biological differences do not argue that women are mere instruments for the procreation and survival of humankind; rather feminists maintain that women are able to experience human connection in a way that men cannot. Women's greater responsibility for household labor should be valued and understood in the context of this intense mothering experience.

Many other scholars contend that the structural conditions of the economy relegate women to the home sphere. Vicki Schultz, for example, argues that employer discrimination in the market limits women's opportunity for growth and upward mobility in the workforce.⁵⁰ Professor Schultz concludes that because employers view "women as inauthentic workers, uncommitted to wage work as an important life interest and source of identity,"⁵¹ they restrict women to low-paying and demeaning jobs. Discrimination combined with a generally harassing atmosphere arguably causes many women to lower their aspirations and commitment to the waged labor force.⁵² Consequently, many women have no choice but to assume the caretaking role in the household, knowing that it is difficult if not impossible to achieve individual success in the market.⁵³

Although the division of labor within the household all over the world generally entails women working in the home and men working outside of the home, in some societies these roles have been separated from a person's sex. In some American Indian societies, for example, males who showed a clear desire to work in the home alongside women were encouraged to do so, and women who desired to live as a man were entitled to go through the tribal rituals for men and then to live as a man. See AMOTT & MATTHAEI, *supra* note 4, at 37.

50. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1750, 1799-1815 (1990); see also Patricia Gerald Bourne & Norma J. Wikler, *Commitment and the Cultural Mandate: Women in Medicine*, in WOMEN AND WORK: PROBLEMS AND PERSPECTIVES, *supra* note 36, at 111, 112-14 (exploring how male expectations and assumptions about women's place in medicine constricts women's options); Martha Albertson Fineman, *Preface to MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* at x-xii (Martha Albertson Fineman & Isabel Karpin eds., 1995) (arguing that motherhood is a colonized concept that is imposed on all women in context of law and legal institutions, regardless of whether women are mothers or not).

51. Schultz, *supra* note 50, at 1755-56.

52. What are often interpreted as sex differences in work behavior may be more accurately explained as "organizational behavior." See Rosabeth Moss Kanter, *The Impact of Hierarchical Structures on the Work Behavior of Women and Men*, in WOMEN AND WORK: PROBLEMS AND PERSPECTIVES, *supra* note 36, at 234 (arguing that women who are disadvantaged by aspects of market such as wage gap and discrimination are likely to limit their aspirations and thus are less likely to be perceived as promotable and more likely to find themselves in low-level and low mobility jobs).

53. See MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 22 (1991) (noting contemporary feminist analysis focusing on institutional structures and their historical inadequacies in incorporating women); Schultz, *supra* note 50, at 1824-39 (noting powerful disincentive for women to move into and remain in nontraditional occupations). Indeed, not only do courts assume that women have gendered preferences to perform household tasks, but even if women work in the market, courts assume they prefer positions similar to the "social and cooperative aspects" of the work they seek in the home. See Schultz, *supra* note 50, at 1799-1814 (explaining that judicial framework for interpreting sex segregation results in assumption that women form their choices about work based on biology or on cultural influences, but not because of structural problems in workforce); see also Katharine T. Bartlett & Carol B. Stack, *Joint Custody, Feminism and the*

Finally, some feminist scholars note that caretaking roles produce psychological differences between men and women that perpetuate the gendered nature of the household. Carol Gilligan, Nel Noddings, and Sarah Ruddick, for example, have all argued that women's mothering capacity and experience can cause women to focus on the importance of human connection rather than on individual autonomy.⁵⁴ Thus, in addition to physiological traits and institutional

Dependency Dilemma, 2 BERKELEY WOMEN'S L.J. 9, 38-40 (1986) (analyzing mixed effects of courts' efforts to enable women into workforce and noting they benefit some women, hurt other women, and simultaneously help and hurt others).

Some economists argue that women are not relegated but rationally choose to perform greater amounts of unwaged labor in the household in light of the structural character of the market. In 1990, women on average earned only 71.8% of what men earned in the market. THE WOMEN'S RESEARCH AND EDUCATION INSTITUTE, THE AMERICAN WOMAN 1992-93, at 355 tbl. 7-1 (Paula Ries & Ann J. Stone eds., 1992). Shifting unpaid household labor to the lower wage earner, therefore, frees the high wage earner to maximize his earning potential. Gary Becker argues, on this basis, that it is often a woman's preference to perform all of the household work, making possible greater overall benefits to the family than if both the husband and wife split waged and unwaged work equally. BECKER, *supra* note 47, at 14-24. For an excellent summary of the various economic theories that seek to explain the gendered wage gap, see Hadfield, *supra* note 49, at 91-94 (outlining theories of demand-side preferences, strategic employer behavior, supply-side information barriers, productivity mechanisms, and supply-side preferences). Ironically, as Deborah Rhode has noted, lack of job wage equality between men and women has created job opportunities because employers preferred female employees that could be paid less. RHODE, *supra* note 2, at 30-31.

While the structural aspects of the market are important for understanding women's economic position, some have argued that focusing only on the structural explanation for economic subordination is problematic. Michael Burawoy points out that such an analysis tends to degenerate into "pessimistic overestimations of the power of the welfare state, the capitalistic economy, or 'the system.' Too often, the system is seen as all-determining, so that forms of resistance such as innovation, negotiation, and rebellion are not taken seriously." Michael Burawoy, *The Extended Case Method*, in ETHNOGRAPHY UNBOUND: POWER AND RESISTANCE IN THE MODERN METROPOLIS 271, 284 (Michael Burawoy et al. eds., 1991).

54. CAROL GILLIGAN, IN A DIFFERENT VOICE 2 (1982) (arguing women's and men's divergent experiences lead them to develop different perspectives and values); Nel Noddings, *Ethics for the Standpoint of Women*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE, *supra* note 31, at 160, 166-71 (noting that traditional women's work causes women to value caring and human relationships); Sara Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342-67 (1980) (exploring effect that maternity has on women's lives). See generally NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978) (analyzing the impact mothering roles have on women's lives); DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1977) (challenging assumption that woman must be main adult presence in child's life).

Many argue women's caretaking role is voluntary and often comes about because women tend to think in terms of an ethic of caring and responsibility and view themselves as fundamentally connected to others. This notion of care "connotes responding to the needs of other persons with whom one is in a web of relationships, as well as alleviating the suffering of the world." Linda C. McClain, *Atomistic Man Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171, 1184 (1992). Women's mothering experience is often used as an example of this ethic of care. The mother-child relationship demonstrates that women, unlike men, routinely and naturally respond to inequalities by nurturing and caring for a weaker, dependent person. Many feminists argue that women's ethic of care demonstrates the importance of "women's work" and that relational feminism should be used to form moral legal theory in general. *Id.* at 1184-85.

It could be argued, however, that courts and legislators already subscribe to the stereotyped images of women's natural caretaking role and nurturing sensibilities. See Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 52 (1989) (arguing that courts have adopted process of valuing wage-earning capacity that devalues women's earning

structures, the psychological and emotional differences between men and women arguably contribute to women's greater responsibility over household activities.

The extent of the biological, structural, and psychological influences on the division of labor between the genders is hotly debated and far beyond the scope of this article. Regardless of the underlying cause, however, the end result does not change: women continue to be materially disadvantaged because of their actual or perceived household responsibilities "despite decades of legislative efforts to equalize women's position in the waged labor market."⁵⁵ Rather than having well-paid and prestigious jobs, women often have part-time jobs or jobs with flexible schedules, low pay, and fewer fringe benefits (e.g., retirement benefits, health insurance, and holiday and sick leave).⁵⁶ Women who occupy full-time positions in the market are often forced into low-paying jobs with little possibility of advancement by employers who anticipate that women will exit the market to undertake household responsibilities.⁵⁷ The gendered nature of the household contributes, therefore, to women's economic vulnerability.

2. The Paradox of Housework

It is impossible to generalize about women's views on the relative value of housework versus marketwork. These views are influenced by a variety of social factors, including race and class. Some feminists perceive the division of labor between the genders as oppressive because women "perform a disproportionate share of work in the household, while men receive disproportionate

potential); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 830 (1989) (arguing women's choice to stay in home is result of both "seductive compliments" women receive for domesticity and notion that women are more moral than men). It is not the ethic of care, however, that is problematic. Rather it is the assumption that goes along with it—that women should provide free caretaking services for the family, enabling independence for the family while remaining dependent, herself. A caretaking morality should not be equated with self-sacrifice and giving, although society in general, and the Tax Code in particular, have encouraged this way of thinking. Women subscribing to this ethic of care can focus on themselves and their own well-being to attain a sense of personal integrity and security. McClain, *supra* at 1196.

55. Becker, *Maternal Feelings*, *supra* note 47, at 157; see also BERGMANN, *supra* note 41, at 213-14 (discussing need for maternity leave programs to enable women to undertake household responsibilities without economic penalty); Martha N. Ozawa, *Conclusions: Women and Society*, in WOMEN'S LIFE CYCLE AND ECONOMIC INSECURITY: PROBLEMS AND PROPOSALS 194, 194 (Martha N. Ozawa ed., 1989) (arguing that social roles imposed upon women lead to inequality in marketplace); Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 560 (1990) (discussing how division of labor creates cycle keeping women subordinated by and to men).

56. See SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 149-56 (1989) (discussing housework and cycle of vulnerability it causes for women); Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?*, 17 ANN. REV. SOC. 51 (1991) (discussing women's economic hardship following marital dissolution and its multiple factors).

57. See BERGMANN, *supra* note 41, at 4 (noting that employers continue to establish work schedules, leaves of absences, and transfers based on assumptions that workers are men maintaining full-time housewife); McCaffery, *supra* note 1, at 1011 (noting that 30% of compensation comes in form of fringe benefits that are often awarded only to traditional full-time workers).

advantages in the form of services and access to income.”⁵⁸ This view, however, is not universal. Some women view nurturing and caretaking responsibilities as a source of fulfillment and happiness. Thus, although reproductive labor is “devalued, exhausting, confining and a principal way that women are shackled to an inferior status, motherhood is for many women life’s greatest joy.”⁵⁹

In addition, because of the various barriers (e.g., relatively low wages, few advancement opportunities, and a discriminatory atmosphere) that hinder women’s success in the market, some women perceive control over children and the home sphere as the only meaningful source of power they experience.⁶⁰ Accordingly, women are often unwilling to give up the conventional role in the home for the stressful and often demeaning atmosphere of the paid labor force.⁶¹

Martha Fineman argues that although women suffer the material burdens of motherhood, the work associated with nurturing and caretaking responsibilities is not necessarily oppressive. Professor Fineman emphasizes that scholars ignore powerful aspects of motherhood when they link gender equality solely with women’s potential to enter the waged labor force. Indeed, by recognizing the value of housework and by creating an explicitly positive symbol of women’s nurturing responsibilities, women’s economic status might improve. Rather than being cast as inconsequential, caretaking responsibilities could be treated as worthy of economic subsidies and rewards.⁶² Fineman concludes that

58. GLENN, *supra* note 41, at 192.

59. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 97 (1993) [hereinafter Roberts, *Motherhood and Crime*]; see also RHODE, *supra* note 2, at 134 (homemaker role has been empowering and enriching as well as confining). But see Jennifer Roback, *Beyond Equality*, 82 GEO. L.J. 121, 129 (1993) (arguing that women should not be concerned with negative economic consequences caused by their high levels of household labor because it is valuable labor and “one thing in life that [is] really worth doing”).

60. See HOOD, *supra* note 37, at 12-13 (arguing that bargaining power, and not the sexual division of labor, is important for determining gender-equality); PLECK, *supra* note 37, at 81 (noting that women may have considerable psychological investment in their relative monopolization of power within the family and in some cases could feel threatened if their husbands move into this domain); Kanter, *supra* note 52, at 234 (discussing institutional barriers to women’s market participation causing women to lower their expectations or leave market altogether). Women who seek to work at home and are able to negotiate such a role could then be viewed as having power and control in the household.

61. See VICTOR R. FUCHS, WOMEN’S QUEST FOR ECONOMIC EQUALITY 32-57, 75-93 (1988) (discussing institutional and structural barriers to women’s economic equality and arguing that although majority of women have moved into paid labor force, barriers have resulted in women’s greater workload but not greater economic independence).

Native American women have also argued that they historically have maintained real power and control in the home and have gained social and economic equality despite a traditional sexual division of labor. AMOTT & MATTHAEI, *supra* note 4, at 34-38. Many Native American women maintain that despite women now undertaking traditionally “male” roles in the market, they suffer greater inequality with men. Indeed, many American Indian women leaders have called for a return to a more traditional division of labor so women can obtain more equal power with men in the home. *Id.* at 56, 58-59. But see McCaffery, *supra* note 1, at 1051-52 (arguing that women who choose to maintain household roles suffer from cognitive error; women who choose traditional division of household labor may think they are serving their own best interests, but are wrong in light of economic and emotional disaster suffered by these women as result of divorce and widowhood).

62. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER

if the state recognized maternal practices as entitling women to special and preferential treatment throughout the law, motherhood would be perceived as "an ethical practice, as embodying an ideal of social 'goodness' . . . [and] a societal aspiration for *all* members of the community."⁶³

Women of color, in particular, often acknowledge the paradoxical nature of household labor. Many critical race theorists have argued reproductive labor can be seen within a "culture of resistance,"⁶⁴ benefitting the family as a whole, not just men. Patricia Hill Collins argues household labor can be viewed as part of a collective effort to create and maintain a family structure in the face of race and class oppression.⁶⁵ Many mothers, for example, see threats to their children's safety and well-being as far more pressing than gender inequality.⁶⁶ Health problems associated with environmental hazards (such as toxic waste dumps) are disproportionately suffered by communities of color.⁶⁷ Consequently, many women of color give up wages and benefits by undertaking flexible work schedules in the market to assume caring and nurturing roles. Collins notes that the household labor involved in assuring children's survival in the face of these heightened health hazards is not oppressive, but rather politically empowering.⁶⁸

Indeed, Dorothy Roberts and Regina Austin suggest that the very act of bearing and nurturing a child represents an act of resistance against patriarchy and racism. Both argue that undertaking these responsibilities challenges the current system that places limits on the ability of black women to have and raise children. The disproportionate denial of black women's parental rights through the foster care system, for example, prevents African-American women from passing on to their children their own cultural identity and practices.⁶⁹ Although

TWENTIETH CENTURY TRAGEDIES 67-68 (1995) (noting that women's caretaking responsibilities could be recognized and rewarded through welfare reform and divorce law).

63. *Id.* at 234-35.

64. GLENN, *supra* note 41, at 192.

65. Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theory About Motherhood*, in REPRESENTATIONS OF MOTHERHOOD 56 (Donna Bassin et al. eds., 1994).

66. GLENN, *supra* note 41, at 192.

67. Judy Scales-Trent, *Women of Color and Health: Issues of Gender, Community, and Power*, 43 STAN. L. REV. 1357, 1360-61 (1991) (noting that segregated housing enables polluters to dump toxic waste into neighborhood causing serious health problems and higher mortality rates); *see also* Taunya Lovell Banks, *Women and AIDS-Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351 (1990) (discussing women of color and high incidence of AIDS).

68. *See* Collins, *supra* note 65, at 64-65 (arguing women of color are concerned primarily with their powerlessness within social institutions that impose sterilization or deny items such as health care); Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in "Women's Work,"* 43 STAN. L. REV. 1333, 1335 n.12 (1991) (citing BETTY LEE SUNG, THE ADJUSTMENT EXPERIENCE OF CHINESE IMMIGRANT CHILDREN IN NEW YORK CITY 151 (1987)) (explaining that Chinese women often accompany their children to and from school to ensure children's safety even though it causes women to lose desperately needed wages); Mary Pardo, *Mexican American Women Grassroots Community Activists: "Mothers of East Los Angeles,"* 11 FRONTIERS 1 (1990) (contending that Mexican-American women organize as mothers to oppose potential health hazards in community, not to raise level of men's participation in household activities).

69. Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 555 (considering whether black single

both Austin and Roberts see danger in viewing reproductive labor as only liberating,⁷⁰ they see it as potentially empowering to women and their community.

Additionally, while many feminists perceive nurturing roles as isolating, this is not true for all women.⁷¹ Professor Roberts notes that motherhood can have the opposite effect for some women. Black women, for example, have a tradition of communal childcare that can lead women to become community activists working for political ends.⁷² Roberts argues that far from being isolating and demoralizing, household labor can be closely tied to community goals such as the elimination of racial discrimination and the empowerment of a community as a whole.⁷³

Thus, while women are overwhelmingly responsible for providing household labor, the value women attach to the labor varies widely. Some women view the labor as isolating and demoralizing, but many others perceive the work as personally and politically empowering. Regardless of how women personally experience the labor, it provides important economic benefits to the household. In most families, if women do not provide the labor, it will be purchased in the market. By failing to value and tax the labor, therefore, Congress ignores the productive and political nature of the work. The next Part of the article examines in more detail the behavioral and distributional effects on women of Congress's failure to tax the labor.

motherhood can be viewed as having "temerity to attempt to break out of the rigid economic, social, and political categories that a racist, sexist, and class-stratified society would impose upon them"); Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. J. GENDER & L. 1, 13, 14 (1993) (discussing manner in which foster care system brutally disrupts black family structures) [hereinafter Roberts, *Racism and Patriarchy*]; Roberts, *Motherhood and Crime*, *supra* note 59, at 120 (discussing difficulty of passing on cultural identity and at same time teaching children to "defy racist stereotypes and practices").

70. Austin, *supra* note 69, at 578 (advocating exploration of subordinating and emancipatory aspects of motherhood); Roberts, *Racism and Patriarchy*, *supra* note 69, at 29 (stating that "[i]t is difficult to identify the emancipatory moments that spark within the vast realm of subordination," but self-destructive and self-affirming behavior must be distinguished).

71. Women of color often fear separation in light of the policies that historically have been used to divide families and disempower communities of color. See, e.g., Collins, *supra* note 65, at 65-66 (noting that Bureau of Indian Affairs often sought to remove Native American children from their homes for boarding schools, and African American women lost contact with children in slavery producing fear of losing children); see also Elizabeth Tobin, *Imagining the Mother's Text: Toni Morrison's Beloved and Contemporary Law*, 16 HARV. WOMEN'S L.J. 233, 239-42 (1993) (discussing representations of fear of separation and disempowerment in Toni Morrison's writing).

72. Roberts, *Motherhood and Crime*, *supra* note 59, at 130-35 (discussing politically and personally empowering aspects of being a black mother).

73. *Id.*; see also Dara Abubakari, *The Black Woman is Liberated in Her Own Mind*, in BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY 585, 585-87 (Gerda Lerner ed., 1972) [hereinafter BLACK WOMEN IN WHITE AMERICA] (noting that caring and nurturing roles can be important for elimination of racial and gender discrimination); Renee Ferguson, *Women's Liberation Has a Different Meaning for Blacks*, in BLACK WOMEN IN WHITE AMERICA, *supra* at 587, 587-92 (asserting that black women seek to assume wife and mother role and often seek to eliminate racial discrimination first, then sex discrimination).

II. THE EFFECTS ON WOMEN OF CONGRESS'S FAILURE TO TAX HOUSEHOLD LABOR

Congress's failure to tax nonmarket activities has both distributional and behavioral consequences for women. Tax commentators have traditionally focused on the distributional effects of nontaxation. Many have argued that by declining to tax the value of household labor, Congress provides valuable tax benefits to families with stay-at-home spouses. These families obtain the value of household labor tax-free, while the same labor performed in the market is subject to taxation. The tax literature has traditionally viewed this unequal treatment as violating the long-standing and firm principle of tax neutrality. Despite this perceived unfairness, tax analysts have uniformly taken the position that administrative difficulties make taxation of nonmarket household labor impossible.

Recently, feminist tax scholars have begun to examine the behavioral incentive structure of the Code. While these scholars acknowledge the distributional effects of the Code, they focus on how the tax structure discourages women from working in the waged labor force. Feminist scholars argue that by failing to tax the benefits of household labor while at the same time taxing the benefits of market labor, Congress encourages women to undertake a conventional household role that makes them dependent on a traditional wage earner and perpetuates their economic vulnerability.

In this Part, I first explain that while tax incentives exist for women to remain in conventional household roles, the Tax Code's treatment of housework only affects the behavior of women on the margin. Indeed, most women are in the paid labor force despite the tax incentives to remain in the home. I then address the distributional aspects of Congress's failure to tax household labor. While exempting the value of household labor provides a tax benefit to the family, this benefit often does not inure to women due to the unequal sharing of income within the family unit. Not only do women often fail to benefit from the family's lower tax burden, but nontaxation also causes women to lose economic benefits, such as social security, disability, and medicare benefits, which are calculated according to the amount of taxes paid.

A. THE BEHAVIORAL EFFECTS OF EXEMPTING HOUSEHOLD LABOR FROM THE TAX BASE

Although time spent in the household was once viewed primarily as leisure time, there is now little question that the labor performed in the home is productive and valuable. Indeed, economists estimate that the value of household services is equal to at least twenty-five percent of the entire gross domestic product or approximately \$145.6 billion.⁷⁴ Congress's decision to impose a tax

74. See *QUAH*, *supra* note 41, at 96-101 tbl. 4.1 (citing to Johns Kendrick's 1979 estimates of value of household labor and to 15 other economists' estimates of value of women's household labor and effect inclusion of value would have on gross domestic product); see also Cass R. Sunstein, *Well-Being*

only on market activities therefore shelters a significant portion of household income from taxation.

Although the failure to tax nonmarket labor provides a benefit in the form of a lower tax liability, many feminist tax scholars have argued it comes at the cost of encouraging women to undertake a traditional role in the home. Professors Edward McCaffery, Lawrence Zelenak, Pamela Gann, and Grace Blumberg, for example, have all argued that Congress's failure to tax household labor makes it relatively cheaper from a tax perspective for women to work in the home than in the market.⁷⁵ Feminist scholars conclude that Congress, in effect, encourages women to undertake a financially insecure and subordinate role in the household by failing to tax these services.

To demonstrate why Congress's failure to tax household labor might encourage women to remain in the household, consider two hypothetical taxpayers, Deborah and Ellen, each with two children. Deborah works in her home caring for her two children. If the childcare services Deborah provides are valued at \$30,000 in the market, she provides that same value to the household. Ellen, on the other hand, works in the paid labor force earning \$30,000. Because the Code imposes a tax on the income Ellen obtains from her market labor, she will contribute less than \$30,000 to the household. For example, if Ellen's \$30,000 is taxed at twenty-eight percent, she would contribute only \$24,550.⁷⁶ Additionally, Ellen's after-tax salary of \$24,550 would not be sufficient to purchase childcare services if they cost \$30,000 in the market. Unable to afford childcare in the market, the Tax Code encourages Ellen to leave her market employer to perform the household services herself. In short, Congress has made nonmarket labor more valuable than market labor by exempting nonmarket household labor from taxation. Congress's failure to tax nonmarket labor could lead women to *substitute* nonmarket for market labor.

Congress's failure to tax household labor, however, does not produce a substitution effect for all women.⁷⁷ As Anne Alstott has succinctly stated in another context, "it is essential to distinguish disincentives from the *effects* of

and the State, 107 HARV. L. REV. 1303, 1306 (1994) (criticizing gross domestic product as measure of well-being despite exclusion of goods and services such as household activities).

75. See *supra* note 5.

76. This number is calculated without accounting for the standard deduction or personal exemption. Most tax scholars argue that married women in the waged labor force are denied these benefits due to aggregation under the joint return provisions. See *infra* notes 155-57 and accompanying text.

77. Several studies indicate that taxation impacts the level of women's market labor. Due to the tax and thus the increased costs associated with market labor, some women substitute housework for marketwork. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1926 n.86 (1987) (citing numerous economic studies indicating that married women's compensated elasticity is between 1.0 and .4). Many women, however, do not experience a substitution effect, but rather they experience an income effect with higher tax rates. See WALTER BLUM & HARRY KALVEN, *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 23 (1958) (noting that low-income taxpayers are likely to experience income effect, causing them to undertake additional hours of market labor in response to increased tax rates).

disincentives on behavior.”⁷⁸ While the Tax Code does theoretically establish a disincentive to work, empirical data is needed to determine whether the Code has actually affected women’s labor decisions. Sociological studies indicate that the behavioral effects of taxing only market labor depend on a woman’s socioeconomic status. In general, women substitute household labor for market labor when they have access to resources that enable economic survival absent a market wage. Wealthy women or women married to middle- or upper-income men, for example, can substitute unpaid for paid labor without suffering immediate impoverishment.

Many women, however, do not experience market labor and household labor as mutually exclusive. Low-income women, for example, do not have the luxury to leave the market for the home simply because Congress awards tax benefits for such a decision. Consider again the hypothetical taxpayer, Ellen. If Ellen is a single mother, she cannot afford to substitute completely household labor for market labor because her wage provides essential income needed to purchase necessities for the family. Instead, Ellen is likely to work for a wage in the market, seeking at the same time low-cost or free childcare from a family member or friend. Indeed, data unambiguously indicates that low-income women and single women have traditionally performed the bulk of the household labor, yet have also had high levels of market participation.⁷⁹ Low-income and single women, therefore, usually do not have the option to substitute home labor for market labor and instead must work in both spheres to survive economically.⁸⁰

African-American women of all income levels also have high and steady rates of labor force participation, despite the tax benefits Congress provides to stay-at-home spouses.⁸¹ While middle-income white women often substitute the

78. Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 545 (1995).

79. See WOMEN’S BUREAU, U.S. DEP’T OF LABOR, NO. 84-3, FACTS ON WORKING WOMEN 2 (1989) (finding that single women with children are poorest and that divorced women with children are most likely to participate in waged labor force); see also AMOTT & MATTHAEI, *supra* note 4, at 100-01, 113, 117-18 (noting that in nineteenth century, families in need of cash income often sent mothers and daughters out into paid labor force); GLENN, *supra* note 41, at 68 (noting Japanese women have taken important roles in market to help family survive difficult financial years upon immigration to United States).

80. Of course, the disincentives built into the Code may have only a limited effect on many poor working women if the exemptions and deductions eliminate all taxes or if the waged labor is left completely untaxed because it is unreported. The bias in the Code related to Social Security and Medicare withholding, however, would still exist. See *infra* text accompanying notes 101-13.

81. See JAMES A. SWEET, WOMEN IN THE LABOR FORCE 82-87 (1973) (providing data indicating that women of color in general are more likely to participate in waged labor force than white women); BETTE WOODY, BLACK WOMEN IN THE WORKPLACE: IMPACTS OF STRUCTURAL CHANGE IN THE ECONOMY 14 (1992) (“[b]lack women never question the fact that they will work”); Evelyn Nakano Glenn, *Racial Ethnic Women’s Labor: The Intersection of Race, Gender, and Class Oppression*, in HIDDEN ASPECTS OF WOMEN’S WORK 46, 59-61, 66-67 (Christine Bose et al. eds., 1987) (discussing history of black women’s labor market participation); Julianne Malveaux, *The Status of Women of Color in the Economy: The Legacy of Being Other* (June 20, 1984) (unpublished manuscript, on file with *The Georgetown Law Journal*) (providing historical data on black women’s market participation rates and the location of the labor).

role of market laborer for the role of mother, black women rarely experience this substitution effect. Rather, black women often add mothering responsibilities to their roles as market workers. Indeed, married black women with children participate in the waged labor force at a higher rate than any other group; approximately seventy-five percent of married black women were in the labor force in 1987.⁸²

More recently, women of all races and socioeconomic classes have moved into the waged labor force while still maintaining their household responsibilities. Economic downsizing, a desire for greater consumption of goods and services, or simply a general frustration with domestic roles caused nearly sixty percent of all women to enter the waged labor force in 1990.⁸³ Thus, while Congress's failure to tax nonmarket activities encourages some women to substitute household labor for market labor, others experience an income effect, which causes high levels of market participation.⁸⁴ Consequently, women of most classes and races constitute a significant part of the market workforce, and they continue to be responsible for providing seventy to eighty percent of the unpaid household services.⁸⁵

B. THE DISTRIBUTIONAL EFFECTS OF THE EXEMPTION OF HOUSEHOLD LABOR FROM THE TAX BASE

Although the substitution effect is more limited than might be expected, nontaxation of household labor nevertheless provides significant benefits to families in the form of a decreased tax liability. If household labor were included in the tax base, the family's tax burden would increase by the imputed value of the labor. A lower tax burden provides a corresponding higher level of disposable income. If the additional income is shared by each family member, Congress's failure to tax nonmarket labor would arguably benefit the entire family.

Families, however, do not act as a single economic unit, and individuals within the family do not share benefits and burdens equally. To understand the full extent of the gendered nature of the Tax Code, therefore, we must analyze the economic position of each family member individually. Once the family is disaggregated, it becomes clear that women do not always have access to the

82. U.S. COMM'N ON CIVIL RIGHTS, THE ECONOMIC STATUS OF BLACK WOMEN: AN EXPLORATORY INVESTIGATION 26 tbl. 212 (1990) [hereinafter CIVIL RIGHTS COMM'N].

83. THE WOMEN'S RESEARCH AND EDUCATION INSTITUTE, *supra* note 53, at 308 tbl. 6-1; *see also* BERGMANN, *supra* note 41, at 17-39 (arguing that "key to women's economic emergence" is that market price of women's labor has risen as her time is seen as "too valuable to be spent entirely in the home"); James P. Smith, *Women, Mothers, and Work*, in WOMEN'S LIFE CYCLE AND ECONOMIC INSECURITY: PROBLEMS AND PROPOSALS, *supra* note 55, at 42, 45-49 (arguing nuclear family structures, urban living, and long-term decline in fertility are causing women to work in paid labor force); Zelenak, *supra* note 5, at 371 (noting that many women perceive their labor as too valuable to be spent entirely in home).

84. *See supra* note 77.

85. *See supra* notes 34-57 and accompanying text.

family's greater disposable income. Not only are intrafamily resources not shared equally, but failure to tax household labor denies women access to social welfare benefits directly tied to taxation.

In this Section, I first argue that Congress's distinction between market and nonmarket labor does not provide unfair tax benefits to household laborers, as many commentators have concluded. I then explain that nontaxation might economically harm women by denying them access to the social welfare benefits directly tied to taxation.⁸⁶

1. The Allocation of Resources Within the Household

Many provisions in the Tax Code indicate that Congress assumes equal sharing of income within the family. The joint return provisions, for example, allow couples to consolidate their income as if the couple operates as a single economic unit.⁸⁷ Section 1041 of the Code also assumes that a couple acts as a single unit by exempting property transfers incident to marriage, thereby encouraging couples to share not only income, but also their underlying property.⁸⁸ Throughout the entire Code, legally married couples are treated as constructive owners of each other's property rather than as separate individuals.⁸⁹

86. Commentators traditionally have not been concerned with the gender division of labor within the household or the effect a Code provision has on a particular individual. Rather, they have been interested in whether the Code imposes identical tax burdens and benefits upon each household. Because the household is the unit of analysis, many scholars take the position that Congress's failure to tax household labor does not harm women, but provides an unfair tax *benefit* to households with stay-at-home spouses. See, e.g., MUSGRAVE & MUSGRAVE, *supra* note 21, at 385-86 (discussing imputed income of stay-at-home spouses and unfair benefits of nontaxation); Zelenak, *supra* note 5, at 362 (noting that one-earner couples are significantly better off because of their greater imputed income from self-performed services). Scholars point to the unfairness of nontaxation of imputed income when defending the provisions allowing a deduction or credit for childcare expenses, arguing that the deduction or credit neutralizes the bias. See, e.g., Michael McIntyre & Oliver Oldman, *Treatment of the Family*, in COMPREHENSIVE INCOME TAXATION, *supra* note 23, at 224-225. It is argued that because taxation of imputed income from household labor is administratively impossible, Congress must provide a tax benefit to households purchasing childcare in the market. These provisions ensure fairness among all households: those with a stay-at-home spouse get tax-free labor, and those who hire caretakers get a tax subsidy.

87. I.R.C. § 6013 (1994); cf. Epstein, *supra* note 49, at 78-79 (assuming the family operates as single unit when he suggests many women share in gains achieved by men through division of take-home income inside marriage and in other family relationships). But see Thuronyi, *supra* note 23, at 69 (arguing that filing provisions, such as joint tax returns and kiddie tax, are adopted for purposes of administrative ease, not conceptual accuracy).

88. I.R.C. § 1041 (1994) (requiring that basis of assets transferred to spouse or former spouse remains same upon transfer). For a discussion of the fairness of § 1041, see Michael Asimow, *The Assault on Tax-Free Divorce: Carryover Basis and Assignment of Income*, 44 TAX L. REV. 65 (1988) (defending fairness of § 1041) and William J. Brown, *Sexist Sleepers in Domestic Relations Provisions of the 1984 Tax Reform Act*, 30 N.Y.L. SCH. L. REV. 39, 46-47, 70 (1985) (criticizing § 1041 for creating inequality especially in divorce because it is woman who gets low basis property, which will produce tax upon resale).

89. The assumption that a couple acts as a single economic unit produces both beneficial and adverse tax consequences to the family unit. See, e.g., I.R.C. § 267 (1994) (prohibiting deduction for loss on sale of property between husband and wife); I.R.C. § 318(a)(1) (1994) (treating spouse as constructive owner of stock owned by other spouse); I.R.C. §§ 674(d), 677(a) (1994) (treating trust

Most studies indicate, however, that Congress's assumption that families operate as a single economic unit, sharing income and expenses equally, is flawed. Viviana Zelizer, for example, argues that families historically have operated as hierarchically structured groups in which one person controls the allocation and use of money.⁹⁰ Many recent sociological studies indicate that in most cases women do not have meaningful control over family resources.⁹¹ Although access to and control of resources is often tied to the gender hierarchy, the extent of women's power over resources varies between families. The studies discussed below indicate that the control of money is often closely tied to a woman's marital status and the family's income level.

Single women who are heads-of-the-household, of course, have greater disposable income because Congress excludes household labor from the tax base. Although data indicates that households headed by single women have far fewer resources than other families,⁹² presumably the woman is in complete control over all available resources. A lower tax burden therefore leaves greater disposable income for single women.

Married women, however, do not necessarily obtain the benefits of nontaxation. Sociologists have found that women who are married to high-income men are less likely to have meaningful access to disposable income than women living in low-income families.⁹³ The extent of a married woman's control over disposable income thus appears to correspond to her socioeconomic class.

established by taxpayer with spouse as beneficiary as taxpayer's income); I.R.C. § 1239(a) (1994) (not treating profit on sale of depreciable property between husband and wife as capital gain). Professor Anne Alstott argues that focusing on the family unit is the most accurate and fair method for measuring income because one person's income alone does not tell us about the other resources available and the financial responsibilities that come with living in a household. Anne L. Alstott, *The Earned Income Tax Credit and Some Fundamental Institutional Dilemmas of Tax-Transfer Integration*, 47 NAT'L TAX J. 609, 611 (1994).

90. VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* 36-65 (1994).

91. See, e.g., BERGMANN, *supra* note 41, at 211-12 (noting that men as primary wage-earners have retained control over consumption patterns); Hartmann, *supra* note 41, at 376 (arguing that men have more power than women over household decisions regarding income). There is also a vast literature indicating that resources are not equally shared among family members. See, e.g., Christine Delphy & Diana Leonard, *Class Analysis, Gender Analysis and the Family*, in *GENDER AND STRATIFICATION* 57, 65-66 (Rosemary Crompton & Michael Mann eds., 1986) (arguing that there is "marked hierarchy of consumption within families"); Meredith Edwards, *Individual Equity and Social Policy*, in *WOMEN, SOCIAL SCIENCE AND PUBLIC POLICY* 95, 98-99 (Jacqueline Goodnow & Carole Pateman eds., 1985) (noting that all members of household do not equally share income); Diana Wong, *The Limits of Using the Household as a Unit of Analysis*, in *HOUSEHOLDS AND THE WORLD ECONOMY* 56, 56-63 (Joan Smith et al. eds., 1984) (challenging premise that household members equally share resources or even live similar class styles); Michael Young, *Distribution of Income within the Family*, 3 BRIT. J. SOC. 305, 305-06 (1952) (noting that historically men disproportionately benefit from family resources). Although many legal scholars have noted problems associated with focusing on the family unit, they have failed to examine consumption patterns. See, e.g., Zelenak, *supra* note 5, at 348-54 (discussing question of whether couples pool their resources, but failing to analyze consumption patterns).

92. See WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 93-3, *FACTS ON WORKING WOMEN* 5 (1993) [hereinafter *WOMEN'S BUREAU REPORT*] (indicating that 52% of all families below poverty level in 1989 were maintained by women with children).

93. JAN PAHL, *MONEY AND MARRIAGE* 1-2 (1989) (stating that women married to wealthy men often live in poverty); Jan Pahl, *The Allocation of Money and the Structuring of Inequality within Marriage*,

In high-income families, gender relations shape the circulation and control of money within families, often with the man in control. Heterosexual married couples that undertake conventional gender-based roles often allocate economic power to the man. Studies indicate that often married women working in the home are given only enough resources to pay for the family's necessities such as food, clothing, and utility bills.⁹⁴ In this type of allowance system, women rarely have access to personal spending money. Thus, for married women undertaking a conventional caretaking role, a greater level of disposable income resulting from the nontaxation of household labor will not necessarily translate into more resources for the woman.

Married women who earn a wage in the market are more likely to maintain some control over the family's resources. Most studies, however, indicate that the level of economic control corresponds to the level of each family member's market wage.⁹⁵ Individuals who bring in a greater portion of income generally have more control over resources. The continuing gendered wage gap almost ensures that women bringing home a wage will have less control over the family's disposable income than men.

Additionally, married women in the waged labor force tend to use their entire salary for the family's necessities such as food and childcare, while men often seek to reserve a part of their income for their own leisure activities and savings.⁹⁶ Indeed, even some men acknowledge these unequal spending pat-

31 SOC. REV. 237, 245-57 (1983) [hereinafter Pahl, *The Allocation of Money and the Structuring of Inequality within Marriage*]; Jan Pahl, *The Allocation of Money within the Household*, in THE STATE, THE LAW, AND THE FAMILY: CRITICAL PERSPECTIVES 36, 40-44 (Michael D.A. Freeman ed., 1984) [hereinafter Pahl, *The Allocation of Money within the Household*]. Documentation of wife and child abuse as well as evidence of unequal food distribution within the family undermines the assumption of equal sharing of resources and power. See Diana Strassmann, *Not a Free Market: The Rhetoric of Disciplinary Authority in Economics*, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 54, 58 (Marianne A. Ferber & Julie A. Nelson eds., 1993) (noting that economists frequently make faulty assumption that patriarch acts in interest of each individual within household).

94. Pahl, *The Allocation of Money and the Structuring of Inequality Within Marriage*, *supra* note 93, at 244-52; see also Young, *supra* note 91, at 313-19 (discussing allowance system in historical context).

95. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX* 53-56 (1983) (noting that intrafamily power disparities are related to relative income levels); Philip Blumstein & Pepper Schwartz, *Money and Ideology: Their Impact on Power and the Division of Household Labor*, in GENDER, FAMILY, AND ECONOMY: THE TRIPLE OVERLAP 261, 267, 273-78 (Rae Lesser Blumberg ed., 1991) (noting women with significant wages gain more power within household but nevertheless remain responsible for providing bulk of household labor); Pahl, *The Allocation of Money and the Structuring of Inequality Within Marriage*, *supra* note 93, at 252 (noting generally that the greater a woman's salary, the greater her spending power).

96. Ann Whitehead argues that it is important to distinguish between earning and spending patterns. She notes that women often act as "maternal altruists" who purchase the family's necessities before spending on themselves. Ann Whitehead, *'I'm hungry, mum': The Politics of Domestic Budgeting*, in OF MARRIAGE AND THE MARKET: WOMEN'S SUBORDINATION INTERNATIONALLY AND ITS LESSONS 93, 111-12 (Kate Young et al. eds., 2d ed. 1984) (noting women all over world tend to privilege family's need over their own). Whitehead also notes that numerous sociological studies indicate that husbands tend to keep more of their earnings for personal expenditures while women pay for family necessities. *Id.* That childcare costs are assumed to come from women's wages and not men's wages also underscores the data indicating that women use their salaries for necessities while men do not. See

terms. After a discussion at a congressional hearing concerning the definition of women as secondary workers, a married man noted that he anticipated his wife's salary would enable him to undertake his own expensive hobby. Affirming the concerns about intrafamily power disparities, the married man made the following comment after the hearing: "My children are now all in school, and on Monday my wife is going back to work. . . . [I] was thinking to myself, when my wife goes back to work, we will buy an outboard motor."⁹⁷ Of course, to understand the extent of the power disparities within the family, it is important to ask whether the leisure activity does, in fact, reflect *only* the husband's preferences or whether the entire family stands to gain from the expenditure.⁹⁸ The above example, however, reflects the likelihood that some married men assume their wives' market participation will alleviate some of their own responsibility for purchasing family necessities, thereby enabling men to use more of their own salary for their leisure activities and savings.

Even women who have complete control over the family's resources may have only illusory economic power. In low-income families, for example, the woman is often the manager of the family's finances.⁹⁹ Because money is scarce in low-income households, however, this role cannot be seen as a source of power. Indeed, low-income families often perceive economic problems as their greatest worry and responsibility over these matters is often a source of stress.¹⁰⁰

Although Congress's distinction between market and nonmarket labor unambiguously leaves greater disposable income for the family unit, it cannot be assumed that all women benefit from the increased availability of the resources. By disaggregating the family and analyzing women as distinct individuals it becomes clear that, in general, women do not have equal access to the resources made available because of nontaxation of household labor. Indeed, while Congress's failure to tax unwaged labor might increase household income, it is likely that nontaxation disproportionately benefits men over women.

2. Social Welfare Benefits Tied to Taxation

Commentators have described taxation as the means of distributing the

Becker, *supra* note 47, at 154 (noting when many families calculate parental income, childcare costs are subtracted from women's wages, not men's wages).

97. Martha W. Griffiths, *Can We Still Afford Occupational Segregation? Some Remarks*, in *WOMEN AND THE WORKPLACE: THE IMPLICATIONS OF OCCUPATIONAL SEGREGATION* 7, 9 (Martha Blaxall & Barbara Reagan eds., 1976).

98. I thank Sean Fox, an Articles Editor at *The Georgetown Law Journal*, for this point. He raised the question of whether the example in the text necessarily reflects that *only* the husband desired to purchase the boat or if, in fact, the wife and children might have obtained utility from the purchase as well.

99. Pahl, *The Allocation of Money and the Structuring of Inequality within Marriage*, *supra* note 93, at 249-52, 257 (noting women in poverty are more likely to undertake managing and budgeting chores); Pahl, *The Allocation of Money within the Household*, *supra* note 93, at 40-45 (noting low-income women tend to be managers of household resources).

100. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *WORKING WOMEN COUNT!: A REPORT OF THE NATION* 24 (1994) (stating that many taxpayers see themselves as being on edge of poverty and worried about homelessness).

burdens and costs of our government and as necessary to enjoy the “privileges of living in an organized society.”¹⁰¹ Although this vague notion of the benefits taxpayers receive when paying their tax burden aptly describes *income taxes*, the benefits tied to *payroll taxes* are much more direct. Unlike federal income tax revenues, payroll tax revenues are separated from the government’s general operating budget and deposited into a trust fund, the proceeds of which are paid to the taxpayers during periods of disability and retirement. These social welfare benefits, the level of which is tied directly to taxation, provide many citizens essential resources, especially in old age. Because household labor is not taxed, women’s access to these critical resources is greatly restricted.

Unlike the income tax, which provides for a standard deduction and a personal exemption to all wage earners, the payroll tax applies to the very first dollar earned by a taxpayer.¹⁰² Consequently, the payroll taxes represent a much greater economic burden than the income taxes for low- and middle-income taxpayers.¹⁰³ These payroll taxes, however, are returned to the taxpayer in the form of social security, disability, and medicare benefits. By failing to impose a tax on household labor, Congress enables the family unit to avoid paying income and payroll taxes on the housework, but it denies women access to social security, disability, and medicare benefits.

Studies indicate that the social security program is an important source of income for many elderly persons. Most taxpayers are unable to save or to participate in a private pension plan. In fact, social security benefits increase many taxpayers’ retirement income and are the sole source of income for many retirees—especially women.¹⁰⁴ Thus, for many workers, social security benefits serve as the only protection against poverty in old age and in times of disability.

Currently, women must participate in the market to receive independent social security benefits.¹⁰⁵ The extent of the benefits that women receive for

101. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 522 (1937); see also MUSGRAVE & MUSGRAVE, *supra* note 21, at 257 (noting governments may impose taxes to provide social goods and services to public).

102. Employees and employers must pay social security and medicare hospital insurance taxes (collectively known as “FICA”) at a rate of 7.65%. The social security tax is 6.20% of gross wages up to \$61,200 of the employee’s wages. I.R.C. §§ 3101(a), 3111(a) (1994); SOCIAL SECURITY ADMIN., BASIC FACTS ABOUT SOCIAL SECURITY 11 (1995) [hereinafter BASIC FACTS]. An additional medicare tax of 1.45%, again payable by both the employer and employee, is imposed on all wages. I.R.C. § 3101(b), 3111(b); see also BASIC FACTS, *supra* at 11.

103. McCaffery, *supra* note 1, at 997.

104. Martha N. Ozawa & Tae Sung Kim, *Distributive Effects of Social Security and Pension Benefits*, 63 SOC. SERV. REV. 335, 342 (1989) (noting that for many workers, social security constitutes the “first line of defense against old-age income insecurity because they do not receive pension benefits”).

105. Women, of course, are entitled to spousal benefits under the current social security rules. Although these benefits are key to some women’s economic well-being in retirement, they are inadequate for many. First, to obtain spousal benefits, one must be married. Second, as Mary Becker has pointed out, due to severe limitations found in the rules, many married women fail to ever get the benefits. See *infra* note 111 and accompanying text. Finally, I argue Congress should not force women to depend on a spouse for derivative benefits, but should be entitled to the benefits for the work they actually perform regardless of marital status.

their market activities is tied to the level of taxes paid. Market laborers pay payroll taxes on their earned income at a rate of 6.2% for social security and disability benefits and 1.45% for medicare.¹⁰⁶ Upon reaching retirement or in cases of disability, market workers are entitled to benefits based on the number of years worked and the average amount earned. High wages and high levels of market participation, therefore, correspond to greater social security and disability benefits for the taxpayer.¹⁰⁷ As women begin to spend more time in the waged labor force, the number of women entitled to social security benefits based on their own work records increases. In 1960, just five percent of women secured independent benefits; the remaining ninety-five percent of women were either not entitled to social security benefits at all or secured them only through marriage.¹⁰⁸ By 1993, twenty-five percent of women had begun receiving social security benefits based on their own work record.¹⁰⁹

Despite the high numbers of women in the waged labor force, they have not reached benefit parity with men. Because women continue to earn less than men in the market, frequently work part-time, and often leave the workforce completely to care for children and elderly parents, few women earn significant benefits. The structural, psychological, and biological factors discussed above, therefore, prevent women from securing the level of retirement and disability benefits that men obtain through market labor. Although the social security laws entitle married women to derivative social security benefits based on their husbands' waged labor, women often fail to obtain such benefits due to divorce, death, or because their husbands do not qualify for social security. Consequently, women, particularly women of color, suffer high poverty rates in old age.¹¹⁰

As Mary Becker has argued, these high levels of poverty partly result from the structure of the social security system, which benefits waged laborers and not household workers.¹¹¹ By refusing to count unpaid household labor in the

106. I.R.C. § 3101 (a)-(b) (1994).

107. See Richard V. Burkhauser & Karen C. Holden, *Introduction to A CHALLENGE TO SOCIAL SECURITY: THE CHANGING ROLES OF WOMEN AND MEN IN AMERICAN SOCIETY* 1, 1-4 (Richard V. Burkhauser & Karen C. Holden eds., 1982).

108. Barbara A. Lingg, *Social Security Benefits for Aged Women*, 57 SOC. SEC. BULL. 71 tbl. 2 (1994).

109. *Id.*

110. For example, in the 1980s over 40% of older black women had incomes below the poverty level. Julianne Malveaux, *Low Wage Black Women: Occupational Descriptions, Strategies for Change*, 35 (January 1984) (unpublished paper prepared for NAACP Legal Defense and Educational Funds, Inc., on file with *The Georgetown Law Journal*); see also ROMERO, *supra* note 4, at 87 (noting women of color and immigrant women in particular perform bulk of domestic labor in market); Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY IS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 87, 92 (Linda K. Kerber et al. eds., 1995) (noting that Social Security Act originally excluded more than three-fifths of fully employed African-American workers); Marc Linder, *What Hath Zoe Baird Wrought? The New FICA Amendments on Domestic Service Employees*, 66 TAX NOTES 113, 114 (1995) (stating that employers of domestic workers need not pay social security taxes if employee is not paid \$1000 per quarter, denying thousands of household workers disability and old-age pension coverage).

111. Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security and Stone*,

calculation of retirement benefits and by tying such benefits only to wages, Congress has almost guaranteed that women will live in poverty at higher rates than men.¹¹² Thus, although studies indicate that women's combined market and nonmarket labor hours are greater than men's,¹¹³ the social security laws treat women as undeserving of equal benefits.

Although most women participate in the waged labor force, their caretaking responsibilities in the home contribute to a higher incidence of poverty for women than men. Exempting women's household labor from taxation enables the family to avoid the burden of income and payroll taxes but results in women having less access to social welfare benefits. As a result of nontaxation, the family unit has greater disposable income; however, during retirement, a time when many women live alone, women's income often falls to poverty levels. In short, by performing untaxed household services, women enhance the economic position of their families in the short term to the impoverishment of their own economic well-being during old age.

III. MARKET INCENTIVES

Tax scholars concerned with women's economic status argue that Congress's failure to tax household labor encourages women to undertake a conventional role in the home. Consequently, scholars have devised tax reform proposals that will counter the current behavioral bias in the Code by encouraging women's participation in the market.¹¹⁴ In an effort to expand women's career options and to increase salary and advancement possibilities in the market, commentators have focused on two areas of the Tax Code: the childcare provisions and the joint tax return provisions.¹¹⁵

Seidman, Sunstein & Tushnet's Constitutional Law, 89 COLUM. L. REV. 264, 276-85 (criticizing viewpoint that sex-discrimination within social security laws is cultural problem of past and not found within structure of laws).

Alice Kessler-Harris has found evidence in the congressional record indicating that Congress intended women to rely on men for the retirement benefits; such benefits were arguably not for the support of women, but to ensure men felt dignified by providing at least some support for their dependents. Kessler-Harris, *supra* note 110, at 91-95. Not only were the Social Security laws designed for men, but Congress also intended to prevent people of color from obtaining benefits. *Id.* at 91, 93-94. At the time the laws were adopted, 80% of fully employed African-American women were denied participation and coverage. *Id.* at 92.

112. Becker, *supra* note 111, at 278-79.

113. Silbaugh, *supra* note 40, at 11.

114. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1543-60 (1983) (discussing legal reforms intended to enable women to participate more freely and effectively in workplace); Carol Pateman, *The Patriarchal Welfare State*, in *DEMOCRACY AND THE WELFARE STATE* 231, 237 (Amy Gutmann ed., 1988) ("Paid employment has become the key to citizenship, and the recognition of an individual as a citizen of equal worth to other citizens is lacking when a worker is unemployed.").

115. This article focuses on commentators who seek tax reforms that urge women into the market. Once in the market, numerous other tax analysts have noted the problematic nature of other aspects of the tax structure. See, e.g., Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275, 1283-85 (1991) (critiquing Employee Retirement Income Security Act's provisions).

With regard to childcare services, scholars have argued that because women perform the bulk of the services, expenses associated with childcare must be deductible if women are to have a fair chance to compete in the market.¹¹⁶ Commentators have pointed out that the joint tax return provisions impose high tax burdens on married women in the market, thereby discouraging married women's market participation.¹¹⁷ The feminist voice in the tax literature, therefore, has encouraged Congress both to repeal the joint return provisions and to expand the childcare provisions.

The market-oriented approach to reducing women's economic vulnerability recognizes that some women's decisions to enter the marketplace are tax sensitive. This approach, however, provides only a partial solution to the problem. As noted above, women's labor decisions seem less sensitive to taxation than many think. More than forty-five percent of women participate in the market force, and women's participation rate is expected to grow over twenty-five percent by 2005.¹¹⁸ Although these statistics do not indicate women are entirely unresponsive to taxation, they do circumscribe the extent of the problem. Thus, decreasing women's effective tax rate may only affect the employment decisions of women on the margins. Additionally, market-based tax reform fails to acknowledge the value of women's household labor.

In this Part, I first illustrate the operation of the current tax structure and outline proposed market-based amendments to that structure. I then evaluate the advantages and disadvantages of each approach. Finally, I conclude that feminist goals might be furthered if we turn our gaze around and examine unpaid labor in the home as well as women's paid labor in the market.

A. CHILDCARE EXPENSES UNDER SECTIONS 21 AND 129 OF THE TAX CODE

In this section, I briefly describe the technical aspects of the childcare provisions currently in the Tax Code. I then explain the feminist critique and the traditional defense of the provisions. Finally, I suggest how the debate has ignored sociological data and examine the limitations inherent in using tax-driven childcare support programs.

1. Tax Benefits

Since the adoption of the Tax Code in 1913, Congress has distinguished between business and personal expenses, allowing deductions only for business expenses. Tax commentators generally support the personal/business distinction, arguing that a taxpayer's personal habits of consumption should not affect the income tax paid. When a person exchanges income for personal consumption, his or her total welfare has arguably increased or the taxpayer would not have made the purchase. When money is spent solely in pursuit of additional income, however, the expense does not increase welfare unless it produces additional income and thus only

116. See *infra* notes 119-30 and accompanying text.

117. See *infra* notes 145-62 and accompanying text.

118. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 92-1, FACTS ON WORKING WOMEN 1 (1992).

the profit should be taxed.¹¹⁹ Although the distinction is easily stated, it is often difficult to distinguish between personal and business expenses in practice. Childcare expenses are particularly difficult to identify. Many taxpayers have argued that such expenses are associated with women's ability to work in the market and thus should be characterized as a business expense. Courts, however, have deemed childcare expenses to be personal in nature and therefore nondeductible.¹²⁰

In 1954, Congress amended the long-standing judicial rule prohibiting the deduction of expenses incurred in hiring childcare. Although Congress did not explicitly recharacterize the expense as business related, taxpayers are now permitted to deduct the expenses to the extent they are incurred to "enable gainful employment."¹²¹ By allowing the deduction of childcare expenses, Congress has recognized that time-consuming and costly childcare activities can interfere with participation in the market.¹²² The Code currently provides a tax subsidy for costs associated with childcare through two different provisions—section 21, which provides taxpayers a nonrefundable tax credit and section 129, which allows a deduction for childcare expenses.

Section 21 provides a tax subsidy equal to thirty percent of the cost of childcare.¹²³ The total amount of expenses that can be taken into account in calculating the credit, however, is just \$4800 if the taxpayer has two or more children. Congress, intending the subsidy for low-income taxpayers, phases out the credit as the taxpayer's income increases. The credit decreases by one percent for every \$2000 the taxpayer earns over \$10,000 until the tax credit is reduced to twenty percent.¹²⁴ A taxpayer earning \$12,000, therefore, could only

119. David A. Steele, *The Deductibility of Childcare Expenses Re-examined: Symes v. R.*, 7 CAN. FAM. L.Q. 315, 324-25 (1991).

120. *See, e.g.*, *Smith v. Commissioner*, 40 B.T.A. 1038, 1039 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940) (*per curiam*).

121. I.R.C. § 129 (1994).

122. The deduction was not intended to encourage all women into the market, but only low-income women who could not afford everyday necessities. Blumberg, *supra* note 5, at 70-72.

123. I.R.C. § 21 (1994).

124. I.R.C. § 21 (a)(2) (1994). The following chart indicates the tax credit Congress permits taxpayers to take:

| Percentage of Childcare Expenses | | |
|----------------------------------|---------------------|---------------------|
| Adjusted Gross Income | Percent of Expenses | |
| Over- | But not over- | Allowed as a Credit |
| \$ 0 | \$10,000 | 30% |
| 10,000 | 12,000 | 29% |
| 12,000 | 14,000 | 28% |
| 14,000 | 16,000 | 27% |
| 16,000 | 18,000 | 26% |
| 18,000 | 20,000 | 25% |
| 20,000 | 22,000 | 24% |
| 22,000 | 24,000 | 23% |
| 24,000 | 26,000 | 22% |
| 26,000 | 28,000 | 21% |
| 28,000 | | 20% |

deduct twenty-nine percent of her childcare costs. Thus, if the hypothetical taxpayer, Ellen, pays \$10,000 per year in childcare, she is entitled to offset her taxes by \$960 pursuant to section 21.¹²⁵

Section 129 of the Code also provides a subsidy for childcare. Pursuant to section 129, a woman who participates in an employer-established "dependent care assistance program" is entitled to take up to a \$5000 deduction for expenses.¹²⁶ Like section 21, section 129 is extremely limited. Because it governs expenses connected with childcare plans set up by an employer, few employed women obtain the benefits of section 129, and unemployed women seeking a job obtain no benefits under the provision. Additionally, because section 129 provides a deduction to taxpayers, the provisions benefit high-income households more than low-income households.¹²⁷ Finally, as a deduction, section 129 allows the taxpayer to avoid paying taxes on the childcare expenses; it does not operate to reimburse the taxpayer for such expenses. Thus, even if the taxpayer is in the highest tax bracket, excluding \$5000 from taxation will enable the taxpayer to obtain a tax savings of approximately \$2000, an amount far below actual childcare costs.¹²⁸

Many commentators have noted Congress's intent to foster women's entry into the waged labor market. Tax scholars, however, also point out that Congress has limited the childcare deduction provisions, unlike other business expense provisions found in the Code. Section 162, for example, permits a deduction for expenses associated with one's business regardless of the profitability of the business.¹²⁹ In contrast, section 21 reduces the tax credit for childcare expenses for taxpayers earning more than \$10,000. Given the reality that women provide unpaid childcare, the Code effectively requires working women, but not working men, to show they are economically constrained to obtain the tax benefit associated with the "business" expense. Although men are assumed to work to obtain the highest amount of wealth, section 21 seems to indicate that women are understood to work only for economic survival. Additionally, there is generally no ceiling imposed with regard to the total amount of a business deduction.¹³⁰ By limiting the amount of the childcare deduction to \$5000,

125. Assuming Ellen earns \$30,000 in the market, she is entitled to a credit equal to 20% of her expenses up to \$4800. I.R.C. § 21 (a), (b), (c) (1994). Thus $\$4800 \times .20 = \960 .

126. I.R.C. § 129 (1994).

127. A deduction is worth more to high income bracket taxpayers because it alleviates a higher amount of tax. A \$5000 deduction to a woman in the 15% marginal tax bracket, for example, will save \$750 while a woman in the 28% tax bracket saves \$1400. See JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 91 (4th ed. 1983) (noting tax benefit associated with deduction depends on tax rate); STANLEY S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 22 (1973) (characterizing phenomenon as "upside-down" deduction).

128. Employed mothers with one child younger than five years old, for example, paid approximately \$63 per week in 1990 for childcare. WILLER ET AL., *supra* note 45, at 31.

129. I.R.C. §§ 163, 263 (1994).

130. Although most business expense provisions do not impose a ceiling or decrease the tax benefit as taxpayer income increases, the Code limits entertainment expense deductions to 50% of the actual costs. I.R.C. § 274(n) (1994).

sections 21 and 129 impose a limitation on childcare expenses that Congress has deemed inappropriate for business expenses incurred in other contexts. In these ways, Congress has restricted the coverage of the childcare provisions.

2. The Limitations of Tax-Driven Child-Support Programs

Feminists noting the limitations in the childcare provisions have argued that Congress should expand sections 21 and 129. Professor Grace Blumberg, for example, has persuasively argued that treating childcare as a “true” business expense would accomplish important behavioral and distributional goals.¹³¹ According to Blumberg, by making childcare expenses fully deductible, Congress would encourage women to leave the home to enter the paid labor force.¹³² Once in the market, the tax benefits would redistribute resources to women by decreasing their tax burden.¹³³

In response to the feminist criticism that the childcare provisions are unfairly limited, other commentators have attempted to justify the limitation by arguing that childcare services are personal in nature. Lawrence Zelenak, for example, in his recent article critiquing the joint tax return provisions, notes that all taxpayers must pay for the personal services they are no longer able to perform themselves due to time spent in the waged labor market.¹³⁴ The limited nature of the childcare provisions, therefore, is Congress’s recognition of the expense as personal and not business.

The debate over the proper characterization of childcare expenses has focused scholars on narrow doctrinal questions to the exclusion of important sociological data. Professor Zelenak and others who focus on the personal nature of childcare expenses ignore the gendered division of labor in the household. Countless studies indicate that women provide the bulk of the unwaged labor in the household, regardless of the family’s race or income level.¹³⁵ Although men undertake certain household tasks, they tend to do jobs that can be done at any hour of the day and that can be postponed if necessary. Mowing the lawn or fixing the car, jobs overwhelmingly undertaken by men, need not be done at a specific hour each day of the week.¹³⁶ The demands on women’s labor, on the other hand, tend to be quite inflexible. Children’s meals must be provided within a specific time frame, and, until children reach a certain maturity level, they may not be left alone in the home.¹³⁷ Because men tend to undertake limited household labor that does not interfere with time spent

131. Blumberg, *supra* note 5, at 63-91.

132. *Id.*

133. *Id.*

134. Zelenak, *supra* note 5, at 375; see also Chanoch Shreiber & Aaron Yoran, *Child Care Expenses: A Proposal for a More Equitable and Efficient Tax Treatment*, 54 TAXES 345, 349 (1976) (noting child care deduction questionable because expenses personal in nature).

135. See *supra* notes 40-41.

136. Demo & Acock, *supra* note 7, at 325-26.

137. See *id.* (noting mothers perform bulk of household chores except for outdoor work and car repairs).

in the waged labor force, the need to hire substitute labor is less pressing. Women's extensive household responsibilities, however, do not enable women to perform waged labor in the market without substitute childcare. Consequently, the limitation of sections 21 and 129 affects men and women disproportionately, imposing economic hardship on women to a much greater extent than men. In short, strict adherence to the personal/business distinction in the context of childcare expenses might cause tax scholars unintentionally to perpetuate the gendered nature of the Code that in practice provides greater tax benefits to men than women.

Similarly, Professor Blumberg's position that treating childcare expenses as business expenses will have positive behavioral and distributional impacts is true only to the extent women are responsive to changes in the effective tax rates. Many women make the decision to enter the market independent of the financial incentives found in the Code. As discussed above, low-income women and women of color of all income levels have had high market participation levels despite the limited childcare provisions.¹³⁸ In addition, a significant number of women continue to think that children suffer emotional harm when their mothers work in the paid labor force.¹³⁹ Because many women view their nurturing and caretaking responsibilities to be of primary importance, they will stay home regardless of the tax benefits available to them by entering the market workforce. Characterizing childcare expenses as business expenses, therefore, will most likely have a behavioral effect only upon women who do not have strong views on women's role in the home or do not have serious financial need.

Characterizing childcare expenses as business expenses also will have only a limited distributional effect. Although women are theoretically entitled to the section 21 tax credit, in practice, many women do not qualify to take the entire credit. Nonrefundable tax credits entitle a taxpayer to offset only the amount of taxes actually owed. As Edward McCaffery has noted, because lower- and middle-income women's salaries do not generate heavy tax burdens, the corresponding credit available is often quite small.¹⁴⁰ Indeed, a low-income family earning \$14,800 incurs a tax burden of only \$75. The credit, therefore, would entitle the family to save just \$75 in taxes. Section 21 offers little financial assistance to lower- and middle-income women. Instead, as McCaffery notes, they are able to save on childcare expenses only to the extent that they can find inexpensive childcare. Although section 21 provides more of a benefit to upper-income women, even these women save only a small portion of their childcare costs. Thus, the credit may reduce a disincentive to work for some women, but it does not come close to offsetting the tax costs associated with childcare for most women.¹⁴¹

138. See *supra* notes 80-83.

139. Zelenak, *supra* note 5, at 369-70.

140. McCaffery, *supra* note 1, at 1017-18 (explaining why credit fails to offset low income families' childcare costs).

141. *Id.* at 1019.

Even if childcare expenses were completely deductible as a business expense or Congress adopted a provision permitting a refundable tax credit, the subsidy would still fail to provide benefits to many women. Low-income women often cannot afford to purchase childcare in the market and instead must rely on family members to provide free services.¹⁴² A subsidy awarded through the Tax Code for childcare expenses would therefore provide no benefit to some women.¹⁴³

By enacting sections 21 and 129 of the Code, Congress has recognized that childcare responsibilities impinge upon women's market participation and hinder their possibility of economic independence. These limited provisions, however, fail to provide meaningful assistance to many women. In addition, expansion of the provisions arguably would have a minimal effect on many women's labor decisions that are largely insensitive to changes in the Tax Code. For these reasons, the current childcare tax provisions prove to be inadequate mechanisms for improving women's economic security.

B. THE JOINT RETURN PROVISIONS UNDER SECTION 1 OF THE TAX CODE

In recent years, tax scholars have shifted attention from the childcare provisions to the joint return provisions as a means to promote women's economic independence. These scholars argue that the joint return provisions impose higher tax burdens on married women than married men, thereby discouraging married women from entering the paid labor force. To offset these distributional and behavioral biases, many commentators, including Professor McCaffery and Professor Zelenak, have called for the repeal of the joint return provisions.¹⁴⁴

In this section, I briefly explain the historical context in which Congress adopted the joint return provisions and the manner in which the provisions affect married couples' tax burdens. I then outline Professor McCaffery's and Professor Zelenak's argument concerning the economic harm women suffer under the joint return provisions. While McCaffery and Zelenak identify a behavioral bias in the Code, the bias, in fact, affects only women on the margins. This section concludes, therefore, by arguing that while repealing the joint return provisions will provide a benefit to some women, Congress could

142. See BARBARA OMOLADE, *THE RISING SONG OF AFRICAN AMERICAN WOMEN* 74-75 (1994) (discussing family networks and traditional kinship ties of black families that work as major support system for many mothers); see also CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 53-54 (1975) (discussing kin networks that provide childcare in low-income black neighborhood); Roberts, *Motherhood and Crime*, *supra* note 59, at 132-33 (discussing cooperative networks in which extended family provides communal childcare).

143. WILLER ET AL., *supra* note 45, at 34 fig. 8 (providing statistics indicating that families with income of over \$50,000 are most likely to claim tax credit under § 21 of Code).

144. Although many tax scholars have analyzed the problematic nature of the joint tax return provisions, I focus on Professors McCaffery and Zelenak because they have most recently addressed the problem. See McCaffery, *supra* note 1, at 1041-46 (arguing that traditional economic welfare perspective argues for separate rate schedules perhaps even with different rates); Zelenak, *supra* note 5, at 365-69 (arguing for separate filing with identical marginal rates for men and women).

provide more broad-based support to women by focusing on women's unpaid labor in the home.

1. The Joint Return Provisions: A Brief History¹⁴⁵

When Congress adopted the individual income tax in 1913, it mandated that tax liability be assessed on an individual basis for all taxpayers regardless of marital status.¹⁴⁶ At its inception, therefore, the Code required husbands and wives to file as two separate individuals. Due to the diversity of state property laws, however, the individual filing system often resulted in unequal tax burdens for married taxpayers with identical incomes in different states.

In states with community property laws, a one-half interest of all community property automatically vested in each spouse regardless of who earned the wage.¹⁴⁷ As a result, each could claim half the income on a separate tax return. By dividing income between two people, the couple could take advantage of a lower marginal tax rate than would be applicable if the couple's income was aggregated on one tax return. In short, by filing two returns, a couple could decrease its overall tax liability.¹⁴⁸

Property laws in common-law states dictated a different result. Because property remained separately owned in common-law states, couples were not permitted to divide their income and file two individual tax returns. Consequently, unlike community property law states, common-law states required the spouse who actually earned the income to pay tax on the full amount earned.¹⁴⁹ Often, this resulted in the imposition of a higher tax burden than if the taxpayer lived in a community property state.

This phenomenon can easily be shown with a simple example. Under the current rate structure, a couple earning \$40,000 is subject to a twenty-eight percent marginal tax rate, and a couple earning \$20,000 is subject to a fifteen percent marginal tax rate.¹⁵⁰ If the couple earning \$40,000 filed two separate returns, each showing an income of \$20,000, each spouse would be subject to the fifteen percent tax rate. In short, the community property law system would enable the couple to avoid paying the additional thirteen percent in taxes that they would have paid on a portion of their income if they aggregated their

145. Numerous articles discussing taxation and the family provide a detailed history of the development of the joint return system. Rather than reproduce these detailed studies, I simply outline the material that has been extensively analyzed elsewhere. For a more detailed treatment of the issue, see Bittker, *supra* note 1, at 1399-1417; Blumberg, *supra* note 5, at 50-59; Gann, *supra* note 5, at 10-24; Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 259-60 (1988); McCaffery, *supra* note 1, at 989-91.

146. Bittker, *supra* note 1, at 1400.

147. Gann, *supra* note 5, at 13.

148. This is possible due to the progressivity of the marginal tax rates. As the spouses' adjusted gross income increases, they are more likely to fall within a higher tax bracket. See *supra* note 5 and accompanying text for an example of this phenomenon.

149. Gann, *supra* note 5, at 15.

150. I.R.C. § 1 (1994).

income and filed a single joint return.¹⁵¹

Aware of the tax benefits of living in community property states, married couples living in common-law states challenged the fairness of a tax system that imposed tax burdens based on residency rather than on income level.¹⁵² In response, Congress amended the Code in 1948 to allow married taxpayers to file jointly. Pursuant to the joint return provisions, Congress no longer required each individual to pay tax on his or her own earnings; rather, they considered married taxpayers to be a taxable unit.¹⁵³ The amendment gave couples in common-law states the same benefits as those obtained in community property law states. In addition to insuring that couples with equal income have equal tax burdens, Congress's decision to treat married couples as the taxable unit fit with the assumption that husbands and wives pooled their income and shared expenses. In short, because married couples were perceived to act like a single economic unit, Congress treated them as a single unit for tax purposes.¹⁵⁴

2. Aggregation Under the Joint Return Provisions

Pursuant to the joint return provisions adopted in 1948, spouses may aggregate their income and pay tax as a single unit according to the tax rate schedule for married couples filing jointly. Of course, married couples are not required to file jointly. Each spouse may file as an individual who is single and subject him or herself to the tax rates applicable to married individuals filing singly, which are the highest rates applicable to any taxpayer.¹⁵⁵

Although tax rates increase with income, the various schedules are not identically progressive. The joint return provisions incorporate the least progressive marginal tax rate schedule, often enabling couples filing jointly to have a lower tax burden than if each filed as single individual taxpayers. Imagine, for example, that Ellen is married and Deborah is single. Ellen and Deborah both have an adjusted gross income of \$30,000 a year, and each is the sole wage

151. Of course, the 28% tax rate will not apply to every dollar earned but only to income that exceeds the 15% bracket. See *infra* notes 152-54 and accompanying text.

152. Consequently, many common-law state legislatures amended their property laws to conform to community property law standards. Gann, *supra* note 5, at 15-16. In states in which the property laws were not amended, couples sometimes formed husband and wife business partnerships to achieve the same tax consequences as couples in community property states. Spousal partnerships enabled couples to divide their income evenly, thereby allowing the couple to file separate tax returns and lowering the effective tax liability of the household. See Jones, *supra* note 145, at 259-60 (arguing that by adopting joint return provisions, Congress made spousal partnerships obsolete, thereby erasing economic power women gained through use of such spousal partnerships; husbands and wives could simply file joint tax return to obtain lower tax burden rather than setting up partnership, giving both spouses legal rights to partnership income and property).

153. Gann, *supra* note 5, at 18.

154. Lawrence Zelenak, however, argues that Congress did not adopt the joint return system in an effort to recognize couples as economic units. He argues that this is simply an argument that advocates of the system have put forward after the adoption of the joint return provisions. Zelenak, *supra* note 5, at 344-54.

155. I.R.C. § 1(d) (1994). Unmarried individuals and individuals who are heads-of-household have separate marginal tax rate schedules. I.R.C. § 1(b), (c) (1994).

earner in the household. Because Ellen is married, she will use the marginal tax rate applicable to married couples and will be subject to a fifteen percent tax rate.¹⁵⁶ Deborah, on the other hand, is subject to the rate schedule applicable to single individuals, and a portion of her income will be taxed at a twenty-eight percent tax rate.¹⁵⁷ Consequently, Ellen will have a lower tax bill. This difference in tax liability is arguably justified because a married couple's salary presumably supports at least one more person than does a single taxpayer's salary.

The benefit obtained by a married couple with a single wage earner, however, begins to evaporate when both spouses participate in the waged labor market. Although filing under the joint return provisions entitles a couple to be taxed at lower rates, these rates are still progressive. Thus, when both spouses are in the waged labor market, the secondary wage earner's income can push the couple into a higher marginal tax rate. For example, a married couple is subject to a fifteen percent tax rate on all income up to \$36,900, and income exceeding that amount is subject to a twenty-eight percent marginal tax rate. Therefore, if both Ellen and her spouse have an adjusted gross income of \$30,000, a significant portion of their income (everything over \$36,900) will be taxed at the twenty-eight percent rate; they would owe \$11,867 in taxes.

In contrast, if Ellen and her spouse were entitled to file as two single, unmarried individuals who each earn \$30,000, they would be subject to a tax burden of only \$10,900. Although the rate schedule under the joint return provisions is less progressive than any other schedule, because it requires a couple to aggregate their income, the couple might be thrown into a higher tax bracket than would apply if they could file separately. Consequently, income aggregation under the joint tax return provisions does not always work to benefit married couples; instead it sometimes imposes an additional tax burden on married couples, commonly called a "marriage penalty."

3. The Market-Oriented Critique of the Joint Tax Return Provisions

Because the majority of couples were dual-income families in 1994, many couples suffered a marriage penalty under the joint return provisions. Professors McCaffery and Zelenak, however, point out that the marriage penalty imposes tax burdens along gender lines. When the family is disaggregated and men's and women's tax burdens are analyzed separately, it becomes clear that women, not men, suffer the marriage penalty.¹⁵⁸

156. I.R.C. § 1(a) (1994).

157. I.R.C. § 1(c) (1994).

158. See *supra* note 144. McCaffery also argues that the joint return provisions effectuate a loss of the earned income tax credit under § 32 of the Tax Code. Under this provision, low-income wage earners are entitled to a refundable tax credit based on the income level and the number of children in the household. The joint tax return provisions will prevent a couple from obtaining the earned income tax credit if their joint income exceeds the phase-out point. Because the credit is phased out as income rises, aggregation under the joint tax return provisions will cause couples with one child who earn over

The gendered nature of the tax burden is associated with the difference in many men's and women's market participation rates. Professor McCaffery notes that married women's market hours are often discretionary or marginal, while married men's market salary is generally key to the family's economic survival. McCaffery points to structural and biological factors that cause women to be the family's secondary wage-earner. Women who have children, for example, are likely to leave the labor force to give birth. When deciding whether or not to return, many women will opt to stay home in light of the gendered wage gap, the cost of childcare, and the tax structure that causes women to be taxed at the highest marginal rate of their husbands.¹⁵⁹

To understand the prevailing argument that women suffer a greater tax burden than men, reconsider our hypothetical taxpayer, Ellen. Because the joint return provisions require that the couple aggregate income, Ellen's wages will be "stacked" on top of her husband's and taxed at her husband's highest marginal rate. If Ellen's husband, for example, has an adjusted gross income of \$30,000 per year, his salary will be taxed at the fifteen percent marginal tax rate. Imagine Ellen undertakes a job that pays \$10,000, a low-paying but flexible job that enables Ellen to undertake childcare responsibilities in the home. Under the joint return provisions, the couple is taxed at fifteen percent up to \$36,900 and twenty-eight on all income past that amount. Thus, every dollar Ellen earns that causes the couple to earn collectively over \$36,900 will be subject to a twenty-eight tax rate.

McCaffery and Zelenak note that the effects of aggregation are beneficial to men thanks to their abiding commitment to the waged labor market. Women, on the other hand, are arguably less committed to the market and thus more likely to move in and out of the waged labor force. McCaffery and Zelenak argue that because women's labor rates are more flexible, women, in deciding whether or not to go into the market, will consider the additional tax burden imposed by aggregation under the joint return provisions. This additional tax burden could often discourage women, but not men, from entering the market.¹⁶⁰

Professors McCaffery and Zelenak and many others have argued, therefore,

\$11,250 to lose a portion of the credit until it is completely lost when income reaches \$21,200. If the couples were entitled to file as individuals, their low income levels might entitle them to a greater benefit under § 32. McCaffery, *supra* note 1, at 995-96.

While McCaffery's insight is important, the economic problems associated with the loss of the earned income tax credit (EITC) arguably do not lie with the joint return provisions. Rather, the problem is associated with § 32's phase-out scheme and could easily be remedied by amending the rate at which the phase-out occurs. Indeed, when Congress adopted § 32 in 1975, the joint return provisions had been a part of the Tax Code for almost 30 years. Presumably, Congress was aware of the effects of aggregation at the time it adopted § 32. See Bittker, *supra* note 1, at 1412-13 (noting joint return provisions were adopted in 1948). If Congress repeals the joint return provisions it would not necessarily mean that it would continue to allow individual taxpayers to claim the credit under the current EITC provisions in light of the limited benefits that they are intended to offer. A repeal of the joint return provisions might, therefore, cause Congress to make corresponding amendments to § 32.

159. McCaffery, *supra* note 1, at 993-94.

160. McCaffery, *supra* note 1, at 993-94; Zelenak, *supra* note 5, at 369.

that it is the primary wage-earner who obtains the benefit of a zero percent tax rate on a portion of income sheltered by the personal exemptions and standard deductions and then gets the benefit of a fifteen percent tax rate on income up to \$36,900. When secondary wage-earners enter the market, they will not get the benefit of the zero percent tax rate, and if the primary wage-earner has income equal or close to \$36,900, a portion of the secondary wage-earner's income will be taxed at a twenty-eight percent marginal rate. Thus, McCaffery and Zelenak argue that the joint return provisions impose a financial deterrent upon secondary wage-earners that does not affect the primary wage-earner, thereby discouraging women's, but not men's, market participation. Because McCaffery and Zelenak perceive this unequal treatment as a violation of longstanding principles of tax neutrality and as inconsistent with notions of optimal taxation,¹⁶¹ they conclude that Congress should tax individuals rather than couples.¹⁶²

4. The Behavioral and Distributional Effects of Repealing the Joint Return Provisions

The prevailing market-oriented critique of the joint tax return provisions concludes that women suffer unfair distributional effects because the aggregation of income often increases their tax burden and discourages their market participation. By focusing on the gendered nature of the rate structure, Professors McCaffery and Zelenak have sparked much debate about the fairness of the joint return provisions. While the Code was once perceived to be a gender-neutral statute, this argument can no longer stand in light of the previous analysis.

Our focus, however, should not be limited only to the negative effects of the joint return provisions on women. It is important to note, for example, that because only legally married women are affected by the joint return provisions, only legally married women benefit or suffer under the provisions. By focusing solely on the joint return provisions, therefore, we might fail to account for single women, particularly women of color who are more often unmarried.¹⁶³

161. McCaffery, *supra* note 1, at 1035-46; Zelenak, *supra* note 5, at 365-69.

162. Although market equality is an important feminist goal, some argue that market labor incentives will not ensure equal treatment of waged laborers. The assumption that women with children will ever be able to have the typical experience of middle-class men is problematic to some scholars. *See, e.g.,* Strassmann, *supra* note 93, at 60-63 (noting that constraints and interdependence stemming from mother-child relationships do not enable individualized market behavior that economists and tax theorists often assume). Additionally, while the argument that women must have choices just like men appears to be a liberating approach to the Tax Code, such an approach does not necessarily alleviate women's oppression. Joan Williams notes that the imagery of choice endorses self-interest, while "the ideology of conventional femininity condemns mothers who pursue self-interest over their children's needs as 'selfish.'" Williams, *supra* note 40, at 1561.

163. For example, while 65% of white women over the age of 18 are married, only 39% of African-American women are married. *See* CIVIL RIGHTS COMM'N, *supra* note 82, at 28 tbl. 2.13; *see also* WOMEN'S BUREAU REPORT, *supra* note 92, at 2 (providing data indicating that 47% of black families are maintained by single women, while 25% of hispanic families and 14% of white families are maintained by single women).

Tailoring tax amendments for married women, therefore, would work more to the benefit of white women than women of color.¹⁶⁴

There are additional reasons for considering issues beyond the joint return provisions. As this section will show, although the joint return provisions impose a financial disincentive for married women to work in the market, the provisions do not, in fact, keep the majority of women from the market.¹⁶⁵ Additionally, in light of the unequal sharing and spending patterns within families discussed above, the potential to redistribute income from men to women by repealing the joint return provisions is quite limited.

a. Behavioral Effects. The prevailing argument that the joint return provisions discourage women from entering the waged labor market assumes that most women are secondary or marginal wage-earners who easily move in and out of the market. Economic studies show this is true for some, but not all, women. Indeed, commitment to the paid labor force is often more closely tied to income level and race rather than marital status.

Women married to high-income wage earners, on the one hand, are often unable to earn a market wage equal to their husband's salary. Because they can earn only a fraction of what their husbands earn in the market, women in high-income families often consider their wages optional or marginal to the family's economic well-being.¹⁶⁶ Low-income women, on the other hand, are highly committed to the workforce and consider themselves coproviders whose income is central to the family's economic survival.¹⁶⁷ Many low-income women, for example, view waged and unwaged labor as inseparable aspects of mothering, each equally important to providing for their children. Employment in the market provides the resources for necessities such as rent, food, and clothing that cannot be provided by the husband's salary alone. An empirical study of married couples located in the Detroit area found that women in

164. McCaffery legitimates this focus on married women by taking the position that married women are more economically vulnerable than single women. He argues that because single women are in the waged labor market at much greater levels than married women, they are more likely to have wage and benefit parity with men. McCaffery, *supra* note 1, at 1039. Data, however, does not support the position that single women are more likely to have economic equality with men; indeed, single mothers are the most economically vulnerable of all women. Almost 20% of all families with children are headed by women, yet they constitute 36% of all poor families. WOMEN'S BUREAU REPORT, *supra* note 92, at 2, 6; see also Pateman, *supra* note 114, at 233 (citing 1982 statistics that women headed 20% of all families with children, but women-headed families constituted 53% of all poor families). Although female-headed households are far more likely to earn less and to live in poverty, they are subject to higher marginal tax rates than are married couples. Focusing only on married women's marginal tax rates, therefore, does not seem to address the concerns of the very women who are the most economically marginalized.

165. As discussed above, although the rate structure might cause some women to leave the workplace, most women are not sensitive to the tax laws. See *supra* note 77 and accompanying text.

166. See JANE C. HOOD, BECOMING A TWO JOB FAMILY 188 (1983) (noting that society often considers work by upper-income women as not necessary to family's survival, thereby relegating them to "junior partner" status).

167. *Id.* at 186 (noting that working wives with family incomes below \$15,000 contribute 47% to 62% of that income while wives with family income over \$25,000 contribute only 33% of the total).

low-income households were far more likely to contribute at least fifty percent of the family's income from waged labor than women in middle- and upper-income households.¹⁶⁸ Consequently, many low-income women are highly committed to working in the waged labor force and do not appear to be deterred by the current tax laws.¹⁶⁹

Women of color at all income levels have also participated in the waged labor force at high levels. In 1990, for example, seventy-three percent of married black women were in the waged labor force compared to just sixty-four percent of white married women.¹⁷⁰ In addition, many African-American women are not the family's marginal wage-earner; in fact, despite their low wages, black women's earnings have often constituted a larger share of total family income than white women's earnings. A 1990 study undertaken by the United States Commission on Civil Rights found that overall, married black women in the market contribute fifty-one percent of the family's income while white women only contribute thirty-nine percent.¹⁷¹ African-American women, therefore, are less likely to perceive themselves as having an "option" to move in and out of the paid labor force depending on the marginal tax rates Congress imposes.

Indeed, black women's waged labor historically has been critical to the survival of their families in light of the racial discrimination in the market that black men suffer. For example, black men suffer much higher unemployment rates than white men, thereby making the income of black women especially important.¹⁷² Black women are often in the waged labor force in greater numbers than black men.¹⁷³ Data indicates not only that women of color historically have been highly committed to the workforce, but they sometimes act as the family's primary wage earner.¹⁷⁴ Thus, to the extent that the joint

168. Suzanne Model, *Housework by Husbands: Determinants and Implications*, 2 J. FAM. ISSUES 225, 233 (1981).

169. Cf. ROMERO, *supra* note 4, at 13 (noting poor immigrant women's high level of market participation and relationship between paid employment and mother's obligation to provide for her children).

170. CIVIL RIGHTS COMM'N, *supra* note 82, at 105; see also WOODY, *supra* note 81, at 41 (noting that marriage has contrasting influences on white and black women; marriage discourages white women's market participation in the waged labor force, but it often produces an increased level of market participation for black women).

171. CIVIL RIGHTS COMM'N, *supra* note 82, at 100 tbl. 8-6. The contributions of women to family income have increased dramatically over the past 30 years. See SWEET, *supra* note 81, at 192 (indicating that in 1964 nonwhite wives contributed 17% of family income, while white wives contributed 12% of the family income).

172. WOODY, *supra* note 81, at 38; Martha E. Gimenez, *The Dialectics of Waged and Unwaged Work: Waged Work, Domestic Labor, and Household Survival in the United States*, in WORK WITHOUT WAGES 25, 30-32 (Jane L. Collins & Martha Gimenez eds., 1990) (discussing importance of women's waged labor during times of economic downsizing).

173. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, NO. 90-4, FACTS ON WORKING WOMEN 8 (1991); U.S. DEP'T OF LABOR, LABOR FORCE, EMPLOYMENT, AND EARNINGS 395 tbl. 615 (1989) [hereinafter EMPLOYMENT & EARNINGS]. For a discussion of this phenomenon, see AMOTT & MATTHAEI, *supra* note 4, at 181.

174. See WOODY, *supra* note 81, at 40 (noting that many black men have dropped out of workplace, transferring "work responsibilities to black women"). Economists predict that by the year 2005, black women in the waged labor force will substantially outnumber black men. WOMEN'S BUREAU REPORT, *supra* note 92, at 2.

return provisions provide significant tax benefits to a couple with just one spouse in the market, the provisions might provide financial assistance to some black families during economically vulnerable periods.

Of course, it is not universally true that upper- and middle-income white women perceive waged labor as optional or that women of color (of all income levels) and low-income women uniformly have high levels of market participation. We cannot assume, however, that all women are marginal wage-earners in light of the data indicating that many women do have high and steady levels of market participation and contribute important resources to the family.

Although the joint return provisions tend to discourage dual-income families, many women are in the market. Thus the joint return provisions and the childcare provisions effect only some women. For example, women who have strong views about the importance of mothering responsibilities will more often stay in the home regardless of the financial incentives or disincentives found in the Code. On the other hand, low-income women who are unable to meet the cost of day-to-day living on their husband's salary alone will work in the market despite the existence of work disincentives found in the Tax Code. In sum, only women without strong views on a women's role in the home or serious economic need will enter the waged labor force because of provisions in the Tax Code.

Thus, although the Tax Code theoretically discourages women's waged labor, empirical evidence does not establish that the Code has actually caused most women to leave the waged labor force. Indeed, in addition to currently available data, historical trends in the labor supply indicate that the tax structure has had only a marginal effect upon women's labor supply. Although the joint return provisions impose costs upon women and provide tax benefits to men, labor trends since the adoption of the provisions are exactly the opposite of what we would predict. The labor force participation rate of men has decreased, while the rate for women has sharply risen.¹⁷⁵ The potential to effectuate broad-based behavioral goals by repealing the joint return provisions therefore appears quite limited.

Indeed, to the extent that our tax goals are behavioral, there might be much more direct methods to encourage women out of the home and into the market. Many studies indicate that it is the need for cash income that pushes taxpayers out into the waged labor market. This phenomenon can be observed in low-income families in which women tend to be in the waged labor force in much

175. Indeed, commentators in every discipline discuss the phenomenon of the increased labor rates of women and the decreasing rates of men in the waged labor force. See, e.g., JOSEPH A. PECHMAN, *FEDERAL TAX POLICY* 77 (5th ed. 1987); Randall McGuire & Cynthia Woodson, *Making Ends Meet: Unwaged and Domestic Inequality in Broome County, New York, 1930-1980*, in *WORK WITHOUT WAGES*, *supra* note 172, at 168, 168-72 (discussing waged labor patterns of men and women in rural New York over 50 year span); see also WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *FACTS ON WORKING WOMEN* No. 92-1, *WOMEN'S WORKERS: OUTLOOK TO 2005*, at 2 tbl. 1 (1992) [hereinafter *OUTLOOK TO 2005*] (providing data on men's and women's market participation rates over 30-year span).

higher numbers than women in high-income families. As Professor Zelenak notes, the traditional family with the man in the market and the woman working in the home continues to be the prevailing model except when there is serious economic need.¹⁷⁶

b. Distributional Effects. Although data indicate that many women do not change their labor decisions in response to the high tax rates resulting from aggregation under the joint tax return provisions, repealing the provisions might nevertheless have important distributional effects. To the extent that the joint return provisions impose a higher marginal tax rate than Congress would impose under a system of individual taxation, repealing the provisions could lower families' tax burdens, which would produce a greater amount of disposable income.

While the market-oriented reform will benefit some women, Zelenak and McCaffery both note that many women will not receive the benefits. Most important, only married women seeking greater market participation will benefit from tax reform that produces an individual filing system.¹⁷⁷ Single women or married women who refuse to move into the market because they perceive it to be their duty to undertake caring and nurturing responsibilities will not receive the tax benefits.¹⁷⁸

Repealing the joint return provisions would enable only market-oriented, married women to obtain higher after-tax income. A lower tax burden, however, does not necessarily translate into greater disposable income for married women. As discussed above, access to and control of family resources is often tied to the gender hierarchy. Although women who work in the paid labor force usually have control over their own income, often they use their entire salary for family expenses such as childcare, rent, and food. Thus, even if women have greater income due to a lower tax rate, the benefits will likely be distributed throughout the whole family. Repealing the joint return provisions might simply enable women to undertake a greater responsibility for living expenses, leaving men more disposable income for their own leisure activities and luxury items. In short, an individual filing system might, therefore, serve to benefit men more than women.

C. PRIVILEGING WOMEN'S MARKET LABOR OVER HOUSEHOLD LABOR

The childcare provisions and the proposed repeal of the joint tax return provisions are both tax-based market incentive programs. This market-oriented

176. Zelenak, *supra* note 5, at 370-71 (citing Gallup poll taken in 1990 that suggests most women work in the paid labor force only because their families need additional monetary income).

177. Married women may benefit because they arguably suffer the burden of the increased marginal tax rates due to the joint filing system.

178. See McCaffery, *supra* note 1, at 663 (noting that some women will choose to stay at home regardless of the pay offered in waged labor market); Zelenak, *supra* note 5, at 370-71 (citing 1990 Gallup poll showing that 63% of people polled believed that children benefit from stay-at-home mother).

approach to tax reform has both behavioral and distributional goals. In general, these provisions aim to encourage women to substitute market labor for household activities, thereby increasing women's market participation levels and ensuring women's greater access to economic resources. While market independence is an important feminist goal,¹⁷⁹ the valuable nature of women's household labor should not be ignored. In this section, I explore the reasons why it is important to value both market and nonmarket labor rather than privilege the former over the latter. I do not mean to suggest that market-equality is unimportant. Instead, I argue that Congress should value all work regardless of where it is performed.

Many theorists have discussed the benefits of greater social recognition of the value of housework. Professors Martha Fineman, Patricia Hill Collins, Dorothy Roberts, and Regina Austin have all argued that nurturing and caretaking responsibilities can be satisfying and politically empowering.¹⁸⁰ The policy goal of encouraging women to substitute market labor for their household labor can only be achieved, therefore, by changing the behavior of women who do not experience household labor as demeaning and oppressive.¹⁸¹ Rather than simply ignoring women's household activities, our feminist goal should be to maintain the positive aspects of the work by helping ensure that society values housework as well.

While focusing on market equality is important, the market-oriented solutions to promote women's economic security ignore the sociological data indicating that women do not substitute marketwork for household responsibilities. Women continue to be responsible for the bulk of the household labor even after moving into the waged labor force. As a result, focusing only upon women's market labor might increase the burden on women by encouraging women to work full-time in the waged labor market and full-time in the home.

Additionally, by focusing solely on market labor, we define nonmarket laborers as dependent individuals and wage-earners as economically independent and autonomous individuals.¹⁸² Many wage earners, however, remain economically vulnerable and are often in poverty due to low wages and limited benefits. A market-oriented conceptualization of equality, therefore, draws on a weak relationship between market participation and economic independence, and as a result, might promote misguided solutions that fail to ensure women's

179. *But see* Roback, *supra* note 59, at 123-25 (arguing that equalizing earning potential of men and women is flawed social goal because economic resources are not adequate measure of well-being or happiness).

180. *See supra* notes 59-74.

181. *See* Dorothy Roberts, *Deviance, Resistance, and Love*, 1994 UTAH L. REV. 179, 185 n.37 (arguing that working in waged labor market can be seen as sign of vulnerability, not strength and independence).

182. Commentators often conceptualize dependency as intricately related to labor force participation. *See* JUNE AXINN & MARK J. STERN, *DEPENDENCY AND POVERTY: OLD PROBLEMS IN A NEW WORLD* 38 (1988); *see also* FINEMAN, *supra* note 62, at 67-68 (noting that women cannot act as independent economic actors in light of nurturing roles undertaken).

economic independence.¹⁸³

The single mother's experience demonstrates that market participation does not always translate into economic independence. Single mothers with children are more likely than any other women to participate in the market; seventy-five percent of divorced women with children are in the waged labor force. Despite this high participation rate, this group suffers the greatest incidence of poverty.¹⁸⁴ Additionally, many women do not perceive the marketplace to be compatible with their needs. Women at every income level report that they experience extreme stress and fatigue when they struggle to balance waged work with household responsibilities.¹⁸⁵ It is not exclusion from the market that seems to cause economic impoverishment and vulnerability, but rather the conditions under which women operate in the market and in the household.¹⁸⁶

By identifying market labor as the only means for women to achieve economic independence, many commentators fail to acknowledge that economic vulnerability results primarily from the difference between the wages and benefits provided for market and domestic labor. The reasons to favor atomistic, market-oriented roles over caring, nurturing, and relational roles often depend on cultural values that are not universally shared; our society unfortunately recognizes economic value in marketwork but not housework.¹⁸⁷ As a result, defining women's dependence in terms of the market/nonmarket dichotomy

183. Focusing only on the extent to which women are in the paid labor market ignores the data indicating that women's labor has never been as highly valued as men's labor. Indeed, women have long argued that they obtain lower wages and fewer benefits because of their sex. See, e.g., Siegal, *Home at Work*, *supra* note 4, at 1129 (noting that early feminists argued women are paid lower salary in market simply *because* they are women). Simply calling for women to move into the waged labor force does not ensure wage and benefit parity with men in light of the pervasive racism and sexism in the market. See Barbara F. Reskin, *Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work*, 2 GENDER & SOC. 58 (1988). Historical evidence bears this out. Data indicates that when women move into a male dominated occupation, men get out, resulting in a pay and a status decrease. Rosemary Hunter, *Afterword: A Feminist Response to the Gender Gap in Compensation Symposium*, 82 GEO. L.J. 147, 155 (1993) (arguing that once women get into labor force "there is no guarantee that gender segregation will not reconstitute itself in a different pattern, with women still clustered in relatively low-paid labor market ghettos").

184. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WORKING WOMEN, NO. 89-3, WORKING MOTHERS AND THEIR CHILDREN 2 (1989) [hereinafter WORKING MOTHERS]; WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WOMEN, NO. 93-3, WOMEN WHO MAINTAIN FAMILIES 5 (1993) [hereinafter MAINTAIN FAMILIES].

185. Lucie White, *On the "Consensus" to End Welfare: Where Are the Women's Voices?*, 26 CONN. L. REV. 843, 846-47 (1994) (discussing work/family dilemma that women at all income levels suffer); see also RHODE, *supra* note 2, at 134 (asserting that although domestic sphere has been source of oppression, so have public institutions).

186. See Peter Pitegoff, *Child Care Enterprise, Community Development, and Work*, 81 GEO. L.J. 1897, 1921 (1993); see also Pateman, *supra* note 114, at 244 (noting that women in waged labor force are seen or see themselves primarily as wives and mothers and their wage is considered "supplemental," justifying reduced wages and benefits).

187. See generally Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in FEMINISM AND POLITICAL THEORY, *supra* note 49, at 145-53 (discussing communitarian and individualistic conception of identity and social attachments).

casts the issue as one of how to assimilate women into the traditionally male sphere rather than how to value the work women do in the home.

Encouraging women to participate in the market to ensure independent access to the wages and benefits that are currently offered to men might also further devalue domestic labor. Commentators advocating a formal equality approach concerning women's labor and benefits might unintentionally accept the male norm of achievement, which tends to sanction oppressive arrangements.¹⁸⁸ For example, encouraging women to perform market labor will not necessarily alleviate their household responsibilities or the double workload women endure while participating in the market workforce. Focusing only on women's limited market participation relative to men's fails to acknowledge that women are currently performing work in the home worth at least twenty percent of the gross national product, or \$145 billion.¹⁸⁹ Viewing women's economic dependence as caused by insufficient market labor might promote the belief that nonmarket housework is not valuable. Women who choose to care for their children must be recognized as making a valid choice and as contributing valuable labor to the economy. Most important, that choice must not hinder their economic independence.¹⁹⁰

Finally, women's entry into the market may not work to break down the current gender hierarchy. As Reva Siegal has noted in an historical context, facilitating women's entry into the market can potentially exacerbate gender inequality as well as race and class exploitation. Upper-middle income women, for example, use their economic power to escape the double-day syndrome by reassigning childcare duties to low-income women, often of a different race.¹⁹¹ And regardless of whether the domestic worker performs the labor in the employer's home or in the market in day-care centers, the labor is primarily performed by women for low wages and few or no benefits.¹⁹² Thus, when

188. Finley, *supra* note 3, at 1152-59 (discussing formal equality and "male norm"). While Professor McCaffery argues that married women should be subject to *lower* marginal tax rates than married men, his goal is to enable women to have the same market options that men have, not to account for their greater levels of housework. See McCaffery, *supra* note 1, at 1053-59.

189. QUAH, *supra* note 41, at 89 (citing 1973 estimate of value of labor).

190. For an insightful and extremely interesting account of how the development of the market economy causes many to believe women are not actually engaging in "work," see Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth Century Economic Thought*, 16 *SIGNS* 463, 465 (1991); see also Siegal, *Home at Work*, *supra* note 4, at 1092-94. See generally BORIS, *supra* note 4 (discussing homework and challenging popular work/home divide).

191. Siegal, *Home at Work*, *supra* note 4, at 1198-202 (discussing early feminists who sought to arrange cooperative housekeeping, which would result in high-income women paying low-income women to do their housework). For a discussion of this phenomenon today, see ROMERO, *supra* note 4, at 29 (hiring domestic worker frees woman to pursue her own occupation—employment at much higher salary than will be paid to domestic worker).

192. See AMOTT & MATTHAEI, *supra* note 4, at 323-26 (providing data over course of 80 years on women who perform domestic services for pay); ROMERO, *supra* note 4, at 98 (upper-income women generally hire low-income women of color to provide extensive physical and emotional labor for very little pay and under harassing conditions); Glenn, *supra* note 68, 1350-53 (providing detailed data on overrepresentation of women of color in service and cleaning industry and noting that white women tend to be employed as supervisors while women of color are disproportionately assigned to less-skilled

women hire childcare assistance, the gendered organization of the household can simply be reproduced in a new form as a relationship between women of different socioeconomic statuses. Regardless of the tax structure, therefore, domestic labor will most likely be undertaken by women, and the work is generally divided along race and class lines as well as gender lines.

IV. VALUING AND TAXING WOMEN'S HOUSEHOLD LABOR

The previous discussion demonstrates that past efforts to increase women's economic security through tax reform have had limited success. Women, for a variety of reasons, have not responded to incentives aimed at encouraging their market participation. As a result, feminist scholars must shift their attention to other means for achieving the goal of economic independence.

In particular, scholars must seriously consider the advantages of broadening the tax base to include the benefits of women's unwaged labor. As discussed above, taxation provides access to substantial, independent social welfare benefits in retirement and disability. Tying the benefits to household labor as well as market labor would ensure greater resources for women and would represent a congressional recognition of caretaking responsibilities as valuable and productive labor.¹⁹³ Broadening the tax base to include nonmarket labor, therefore, is an attempt to ignore the market/nonmarket dichotomy that, in effect, labels household endeavors simply as gratuitous acts undertaken by women out of love and commitment to their families.¹⁹⁴

This tax reform proposal builds on the traditional conception of income,

positions such as cleaning and building maintenance); Linder, *supra* note 110, at 113-18 (noting that Congress adopted legislation that would eliminate social security benefits to household workers in effort to reduce paperwork for family that hire domestic help). For an interesting discussion of the wage deflation in the service industry, in general, see Marc Linder, *Closing the Gap Between Rich and Poor: Which Side Is the Department of Labor On?*, 21 N.Y.U. REV. L. & SOC. CHANGE 22-23 (1993-94) (noting that in light of Department of Labor's exemption of salaried employees from Fair Labor Standards Act, fast-food restaurants and convenience stores have more than quadrupled their supervisory positions seeking to increase hours and at same time avoid paying overtime to their staff).

193. See Charles O'Kelley, *The Parenting Tax Penalty: A Framework for Income Tax Reform*, 64 OR. L. REV. 375, 406 (1986) (advocating tax deduction to offset negative income from parenting and to recognize parenting as service to society); see also Becker, *Maternal Feelings*, *supra* note 47, at 166 (arguing that by failing to speak of women's household labor, we ignore and devalue it).

194. If Congress recognizes the value and importance of household labor in the federal income tax context, perhaps it would be more likely that the work would be valued in every area of the law. For an excellent discussion of the invisibility of housework throughout the law, see Silbaugh, *supra* note 40. I do not mean to suggest that tax-based reform is the only road to women's economic independence. There are, of course, countless other legal mechanisms that could be devised to address the problem of women's economic vulnerability caused by the division of labor along gender lines. See, e.g., OKIN, *supra* note 56, at 180-81 (suggesting that employers make out wage checks equally divided between earner and household laborer); Katharine K. Baker, Comment, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1220-23 (1988) (proposing formula for spousal compensation in divorce based on notions of contract and taking into consideration amount of time women work in home and in waged labor force). But see SARAH HOAGLAND, *LESBIAN ETHICS* (1990) (arguing that state should have less rather than more input into our private lives).

which theoretically includes all increases in the taxpayer's economic wealth.¹⁹⁵ By refusing to make a distinction between labor performed in the private and public spheres, Congress would recognize the value of household labor and the individual laborers regardless of the location of the labor. Rather than viewing women only as nurturing caregivers providing gratuitous services to the home out of love, duty, and custom, women would be treated as autonomous individuals with economic rights. Finally, by taxing household labor, Congress would follow the lead of other areas of law in which the public/private distinction has been seen as both false and problematic.¹⁹⁶

In this Part, I examine the widely held objections to imposing a tax on household labor. Since the adoption of the individual income tax in 1913, the primary objection to taxation of nonmarket labor focused on the administrative difficulties of valuing the work.¹⁹⁷ Although the economics literature once reflected agreement on the impossibility of valuing nonmarket labor,¹⁹⁸ numerous economists have since devised methods by which the labor could be valued in market terms for tax purposes. The second objection economists and tax scholars have raised involves concerns about distributional unfairness.¹⁹⁹ If Congress taxed nonmarket activities, it would impose a financial burden on taxpayers engaged in noncash transactions. Taxpayers performing nonmarket services, therefore, might not have the economic resources to pay the tax. In response to this difficulty, I suggest technical amendments to the Code that would mirror the currently available tax credits, thereby ensuring low-income taxpayers will not be further impoverished by the imposition of a tax on household labor. Finally, I examine the potentially demeaning effects of monetizing or "commodifying" women's household labor.²⁰⁰ Although using market terminology to value nonmarket activities is problematic, I find that because it

195. Tax reform has long centered on a comprehensive tax base that would tax all forms of economic income. See SURREY, *supra* note 127, at 15 (arguing that use of tax expenditure analysis is grounded in value of identifying departures from comprehensive tax base); Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1500 (1994) (noting that income tax fails to include everything of economic value within its definition of income); Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 VA. L. REV. 1357, 1385 (1984) (noting that both liberal and conservative tax reformers have sought broad tax base).

196. See Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 18 (1992) (noting that law has reached into private sphere establishing marital rape as rape, wife battery as battery, and child abuse as abuse). For a critique of the public/private distinction, see, e.g., Roberts, *Racism and Patriarchy*, *supra* note 69, at 7-22 (discussing black women's labor and noting inappropriateness of public/private distinction as theoretical construct for capturing black women's life experience and history).

197. See *infra* notes 201-41 and accompanying text.

198. See 1 SIMON KUZNETS, NATIONAL INCOME AND ITS COMPOSITIONS, 1919-1938, at 6-11 (1941) (discussing exclusion of nonmarket goods from concept of national income); ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 76 (8th ed. 1948) (stating that self-provided services are not included in the definition of income); A.C. PIGOU, THE ECONOMICS OF WELFARE 32-34 (1932) (arguing that self-provided services should not be considered part of national income).

199. See *infra* notes 240-61 and accompanying text.

200. See *infra* notes 263-83 and accompanying text.

would *value* work otherwise considered economically worthless, taxing women's household labor could, on balance, empower rather than oppress women.

A. VALUATION CONCERNS

1. Distinguishing Productive Labor from Leisure Activities

Taxpayers obtain significant "psychic" income from many nonmarket household activities such as watching the sunset, smoking a cigarette, balancing a checkbook, and recycling paper and cans. By providing self-supplied services, such as mowing a lawn and preparing a meal, the taxpayer also provides valuable economic benefits to the household. Theoretically, because Congress seeks to tax all items that improve the taxpayer's well-being, an ideal Tax Code would include the value of these activities within the tax base.²⁰¹ Of course, if Congress attempted to tax all benefits the household received from each family member's labor and leisure, enormous administrative complications would arise. The benefits derived from labor and leisure within each household would vary and the value assigned to such benefits could be wildly disparate. In short, it would be impossible for the Internal Revenue Service to assess accurately and to collect tax liabilities without offensive intrusion into each taxpayer's privacy.²⁰²

Rather than attempting to capture the value of all labor and leisure, Congress could focus only on the productive aspects of household activities. Although long viewed as simply an expression of love and commitment, the productive nature of nurturing and caregiving activities has recently gained wide acceptance outside of the law. Sociologists and economists have begun to generate extensive scholarship discussing and analyzing the productive nature of housework, and many scholars have argued that by understanding the nature of women's contribution to the household, we will have a better understanding of the economy outside of the home.²⁰³

Joan Smith, for example, notes that the availability of nonwage labor helps shape the nature of technological advances in the market. Smith points to the design of washing machines to make her point. Rather than designing large communal washers and dryers, the industry, assuming that household labor necessary to operate a private machine will be available, has designed appliances that accommodate the average size family.²⁰⁴ Gary Becker's work also illustrates the interrelationship between women's labor in the home and the competitive market. Becker notes that by combining labor with goods purchased in the market, the household operates as a "small factory" producing

201. SIMONS, *supra* note 23, at 110 (arguing that list of benefits from household activities is literally endless, making taxation impossible).

202. KLEIN & BANKMAN, *supra* note 23, at 121.

203. See, e.g., Silbaugh, *supra* note 40.

204. Joan Smith, *Nonwage Labor and Subsistence*, in *HOUSEHOLDS AND THE WORLD ECONOMY* 64, 73 (Joan Smith et al. eds., 1994).

such items as meals, clean clothes, and made beds.²⁰⁵ Finally, Euston Quah argues that understanding the value of productive household labor would give us a better understanding of our overall welfare, would provide policymakers with a better understanding of the labor supply, and would enable us to better understand the distribution of wealth between households with different levels of nonmarket labor.²⁰⁶

Economists and sociologists have, therefore, "unquestionably allowed for an interpretation of household activities that both highlights the productive nature of housework and institutionalizes the idea that unpaid work must be analyzed if the economy outside the house is to be properly understood."²⁰⁷ Because women perform the bulk of the productive housework, analyzing the nature of this labor means focusing upon women's unpaid labor in the home.

Although economists and sociologists have uncovered the productive aspects of women's labor, much of the work in the home could be described as having elements of both labor and leisure. A number of economists, however, have set forth theories for distinguishing between women's productive labor and leisure activities. Gary Becker, for example, defines household production in terms of commodities produced.²⁰⁸ Becker argues that commodities are produced through a combination of time and goods purchased in the market. The consumption of those commodities yields utility to the household, the value of which is arguably equal to the value of the household services provided by women.²⁰⁹ By applying this valuation method, the market value of cooked meals and childcare services could be estimated and then taxed by Congress.

Economists have devised numerous other methods to distinguish valuable labor from leisure. Kathryn Walker and Margaret Woods, for example, argue that productive activities are those performed in individual households to create the goods and services that make it possible for a family to function.²¹⁰ Rueben Gronau argues that productive household labor has a close substitute and generates utility similar to market labor while leisure is all other activities.²¹¹

205. Gary S. Becker, *A Theory of the Allocation of Time*, 75 *ECON. J.* 493, 496 (1965). For an explanation of the impact Becker's work has had on traditional microeconomic theory, see Richard A. Berk, *The New Home Economics: An Agenda for Sociological Research*, in *WOMEN AND HOUSEHOLD LABOR*, *supra* note 41, at 113, 113-28.

206. QUAH, *supra* note 41, at 22-23.

207. Silbaugh, *supra* note 40, at 23.

208. Becker, *supra* note 205, at 516-17.

209. *Id.* But see QUAH, *supra* note 41, at 33 (criticizing this approach as too broad because nothing would be excluded as leisure).

210. KATHRYN E. WALKER & MARGARET E. WOODS, *TIME USE: A MEASURE OF HOUSEHOLD PRODUCTION OF FAMILY GOODS AND SERVICES* 261 n.4 (1976).

211. Rueben Gronau, *Home Production—A Forgotten Industry*, 62 *REV. ECON. & STAT.* 408, 408-16 (1980) (proposing method for identifying and estimating productivity and value of household production); Rueben Gronau, *Leisure, Home Production, and Work—The Theory of the Allocation of Time Revisited*, 85 *J. POL. ECON.* 1099, 1104-13 (developing model that estimates value of housework); see also QUAH, *supra* note 41, at 34-35 (citing Gronau study and criticizing it as failing to acknowledge that people enjoy some aspects of their jobs and experience differences in utility between jobs).

Finally, Oli Hawrylyshyn argues productive labor is labor that could be produced by a third person hired in the market without changing their utility to the members of the household.²¹² For example, the utility the household gets from having a clean floor is presumably not reduced when a person outside the household performs the task, while the same cannot be said of attending a jazz concert.

Although economists have not uniformly agreed to a single approach for distinguishing valuable household labor from leisure, and much literature has been devoted to problematic assumptions underlying each approach, they generally agree that separating productive labor from leisure is possible. Thus, although it would certainly not be an easy task, current economic literature indicates that household labor can be distinguished from leisure.

2. Quantifying Household Labor

In addition to distinguishing labor from leisure, Henry Simons raised a concern with quantifying women's labor in different households in his classic work, *Personal Income Taxation*. Simons, who was concerned with tax fairness, argued that while imputing an identical value for household chores to each household would not create administrative complications, it would produce unfair results in light of the varying amounts of productive labor each household produces. Simons concluded that it would be impossible to ensure tax fairness between households by independently valuing each household task without suffering enormous administrative difficulties and government intrusion into the private lives of the taxpayers.²¹³

Of course, a detailed and thorough measurement of the time each woman spends on productive household labor would be administratively impossible. Productive household labor, however, could be quantified based on the number of children in the household, the presence of a husband, and the women's market participation. Time-use studies providing detailed data about the number of hours each family member spends performing unwaged labor in the household could be used to estimate the amount of labor produced.²¹⁴ Thus, there is no need to measure the precise amount of unpaid labor in each household.

Indeed, Congress has balanced the fairness and administrative concerns that Simons raised in similar contexts. Section 151 of the Code, for example, permits taxpayers to take a \$2000 deduction for each household dependent.²¹⁵ Through the deduction, Congress recognizes economic expenses the taxpayer

212. OLI HAWRYLYSHYN, STATISTICS CANADA, MINISTRY OF INDUSTRY, TRADE AND COMMERCE, CANADA, ESTIMATING THE VALUE OF HOUSEHOLD WORK IN CANADA 1971, at 14-19 (1978).

213. SIMONS, *supra* note 23, at 41-58.

214. See, e.g., Demo & Acock, *supra* note 7, at 325-27. For a brief discussion of the available time-use studies, see HAWRYLYSHYN, *supra* note 212, at 19-29; QUAH, *supra* note 41, at 39-42 (discussing studies quantifying household labor). See *infra* notes 304-07 and accompanying text for a discussion of how these factors affect the number of hours women spend on domestic tasks.

215. I.R.C. § 151 (1994).

incurs when supporting a dependent. The provision offsets at least a portion of the costs incurred in caring for children, elderly parents, and other dependents.²¹⁶ Actual expenses within each household are presumably quite disparate and largely dependent on the family's income level. Congress, however, chose to allow a deduction of just \$2000 because it would be administratively impossible to determine the costs of providing dependent care in each household. Congress, therefore, chose to balance the competing public policy concerns by permitting each household a minimum deduction, despite the fact that actual expenses could far exceed the amount allowed to be deducted.

Section 32 of the Code also reflects a congressional balancing of fairness and administrative concerns. Section 32 permits low-income taxpayers to take an earned income tax credit ("EITC").²¹⁷ Congress's intent in adopting section 32 was in part to encourage taxpayers to work in the waged labor force by offsetting a portion of the tax burden associated with earning income in the market.²¹⁸ Taxpayer preference for market versus nonmarket activities are, of course, quite varied. To operate effectively, the amount of the credit should vary according to each taxpayer's personal preference for unwaged and waged labor. Congress would need to provide a large credit to some taxpayers to induce a substitution of market labor for nonmarket labor. Other taxpayers might only need a small credit to be pushed into the market. Despite the impossibility of designing a program that would reflect each taxpayer's individual preference, Congress adopted the EITC provisions. It balanced the public policy concern for reducing the low-income wage earner's tax burden against the desire for administrative ease by creating an EITC program that permits a small tax credit that is phased out as taxpayer's income rises.²¹⁹ As Anne Alstott has recently noted, the EITC program may provide work incentives for some taxpayers, but the program is far from perfect and may even provide market disincentives for others.²²⁰ Nevertheless, Congress opted for the program despite the inevitable constraints and limitations that result when it balances competing public policy concerns.

Similarly, Congress could devise a system that seeks to capture a rough estimate of the time women spend in the home on household tasks and the value of the labor. Congress, for example, could impute a value to the labor based on the number of dependents in the household, the presence of a husband, and the

216. SIMONS, *supra* note 23, at 137, 140 (noting fairness issues that would arise if tax structure imposed identical tax on two families with same adjusted gross income but with different number of dependents).

217. I.R.C. § 32 (1994).

218. George K. Yin et al., *Improving the Delivery of Benefits to the Working Poor: Proposals to Reform the Earned Income Tax Credit Program*, 11 AM. J. TAX POL'Y 225, 230 (1994) (noting goals of program are both distributional and behavioral).

219. See *infra* note 288 and accompanying text (outlining phase-out schedule for family with one child).

220. Alstott, *supra* note 78, at 546-59.

level of women's market participation.²²¹ Although this would not be a precise measure of the value of women's household labor, it would account for at least a portion of the value the household receives.²²²

Although the fairness and administrative concerns that Henry Simons and others have raised are certainly relevant to the task of determining the appropriate quantity of labor to be imputed to household, these concerns do not render taxation a practical impossibility. Congress has balanced these same concerns in many other related and unrelated contexts throughout the Code.²²³ Indeed, just as Congress adopted the EITC and the dependent exemption provisions, it could adopt provisions that estimate the extent and value of household labor to ensure women's access to the social welfare programs.

3. Imputing a Market Value to Household Labor

Finally, Michael McIntyre and Oliver Oldman have argued that even if Congress could identify and measure productive labor, additional problems still exist with determining and assigning a market value to household labor.²²⁴ First, in contrast to waged work, the actual tasks that women perform vary from household to household. Second, women respond to the demands of spouses and children, as well as other social institutions (such as children's school, the transportation system, and health authorities) when providing labor in the home.²²⁵ Third, standards of performance are obscure and are often set by each

221. See John P. Robinson, *Housework Technology and Household Work*, in WOMEN AND HOUSEHOLD LABOR, *supra* note 41, at 53, 58 (providing data indicating that a woman spends more time on household labor when she is married, has children, and does not work in paid labor force); see also *infra* notes 303-15 and accompanying text (discussing implementation of tax tied to these factors).

222. See *infra* notes 303-15 and accompanying text (discussing how imputing income from household labor would likely affect the tax burden of three hypothetical taxpayers).

223. The tax expenditure budget is another well-known example in which fairness concerns prevailed over administrative hurdles. In an effort to uncover the hidden or buried tax subsidies within the tax structure, the Treasury Department first published a list of tax expenditures in 1968. See SURREY, *supra* note 127, at 30-40 (discussing tax expenditure budget from historical perspective and effects it has had on tax reform). Tax analysts consider a tax expenditure to be any provision in the Tax Code that departs from the "normal" structure of the income tax or one that results in revenue losses due to a special exclusion, exemption, or deduction from gross income, a credit, preferential tax rate, or a deferment of tax liability. *Id.* at 15-24. Devising a tax expenditure budget, however, generated a vast literature with many tax scholars taking the position that it was administratively impossible to devise a method that would accurately measure and compute the value of each tax expenditure. See, e.g., Michael J. McIntyre, *A Solution to the Problem of Defining a Tax Expenditure*, 14 U.C. DAVIS L. REV. 79, 79-83 (1980) (noting voluminous and "contentious" literature that developed in response to problem of defining tax expenditure); Gene Steuerle, *Reflections on the Status of Tax Expenditures*, 68 TAX NOTES 485, 485-86 (1995) (noting inadequacy of tax expenditure method, but arguing it is important for testing tax fairness); Edward Zelinsky, *The Tax Treatment of Qualified Plans: A Classic Defense of the Status Quo*, 66 N.C. L. REV. 315, 315-16 (1988) (arguing Code's treatment of qualified plans is consistent with terms of normative income tax and should not be characterized as tax expenditure). Despite the number of commentators taking the position that it was administratively impossible to devise a tax expenditure budget, Congress now requires a list of tax expenditures in the federal budget. See The Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297.

224. McIntyre and Oldman, *supra* note 17, at 1609-13.

225. Joan Acker, *Class, Gender, and the Relations of Distribution*, 13 SIGNS 473, 488 (1988).

women individually. Consequently, the value of the housework could vary dramatically between households. In light of these complications, many tax theorists have taken the position that income from nonmarket labor cannot be valued by applying a formula based on objectively observable factors. Because the services cannot be valued in market terms, many argue the labor is impossible to value accurately and fairly.²²⁶

Although valuation raises fairness and administrative problems, these complications do not prevent taxation. Congress currently does not limit taxation to benefits that taxpayers can easily value in market terms. Indeed, the value of many assets is taxable even when no market exists on which the taxpayer can trade the asset. Employees in the corporate context, for example, receiving unique stock options that cannot be sold in the market or even used as collateral, are nevertheless subject to taxation.²²⁷ The nonexistence of a market, in this context, has not prevented Congress from taxing the stock options, nor have commentators argued the stock options should be excluded from the tax base. Rather, the options are recognized as valuable assets raising the economic status of the taxpayer.

Although Congress has failed to impose a tax on household labor—labor for which a market does exist—economists have devised numerous valuation methods that produce meaningful estimates of the worth of household production.²²⁸ The replacement value method is the most widely accepted method used to value household production. This approach involves equating the value of the household labor with the cost of hiring another person in the market to perform the same work.²²⁹ Determining the replacement value of household labor is easy because the market now provides services formerly available only in the home. These new services include childcare centers, laundry services, and restaurants providing “home-cooked” meals.²³⁰

Professor Daniel Shaviro and others, however, have criticized the replacement value method as being unable to capture accurately the value of self-supplied services. He argues that many taxpayers would not purchase the services at the going market rate.²³¹ Although he argues against valuation and

226. See Thuronyi, *supra* note 23, at 60-61 (noting practical difficulties of assessing a fair tax). But see Thomas Chancellor, *Imputed Income and the Ideal Income Tax*, 67 OR. L. REV. 561, 562 (1988) (arguing that benefits of self-performed services should not be characterized as income even in world with ideal income tax).

227. Kaplow, *supra* note 195, at 1482 n.11; see also I.R.C. § 83(a)(2) (1994) (noting property is includable in gross income at time it is received).

228. For a discussion of the various methods of valuing household labor, see HAWRYLYSHYN, *supra* note 212, at 14-19; see also Euston Quah, *Valuing Family Household Production: A Contingent Evaluation Approach*, 19 APPLIED ECON. 875, 878-80 (1987) (discussing “contingent evaluation” method that determines households’ maximum willingness to pay for different levels of housework).

229. QUAH, *supra* note 41, at 50.

230. *Id.* at 53-54.

231. Daniel Shaviro, *The Man Who Lost Too Much: Zarin v. Commissioner and the Measurement of Taxable Consumption*, 45 TAX L. REV. 215, 228-29 & n.53 (1990) (arguing against taxing value of household labor).

taxation of imputed income, Professor Shaviro notes that if the replacement value method were used, one approach to ensure greater accuracy and fairness would be "simply to discount fair market value by an arbitrary fixed percentage."²³²

Alternatively, Gary Becker has suggested that household labor could be valued according to the individual's opportunity cost of time.²³³ Under Becker's theory, individuals will allocate time to housework until the value of the labor equals the opportunity cost of a market wage.²³⁴ Thus, by determining the amount women could earn in the market, Becker argues that the value of their household labor could also be ascertained.

The third and most simple approach would be to estimate the number of hours per week women spend performing household labor and value the labor according to the minimum wage.²³⁵ Although this approach would impose an arbitrarily low limit on the value of household services, it nevertheless would ensure women who work exclusively in the home have some access to economic resources during periods of retirement and disability. The full-time minimum wage was \$4.25 in 1995.²³⁶ If minimum wages were imputed to a woman with one child for every year the child is considered a minor, and she then worked in the waged labor force earning just \$10,000, she would be entitled to approximately \$520 every month in Social Security benefits upon retirement; these monthly benefits substantially exceed the amount most women receive in social security benefits today.²³⁷

Not only have economists shown that it is possible to define, quantify, and value women's household labor in theory, but in nontax contexts women's household services are routinely assigned a value. For example, many economists have undertaken to determine the magnitude of household services in an effort to understand the full extent of the gross national product and to gain a better insight into our overall economic well-being.²³⁸ In tort cases involving the injury or death of a wife, courts and juries routinely listen to expert testimony on the value of women's services and award damages based on those valuations.²³⁹

232. *Id.* at 229.

233. Becker, *supra* note 205, at 516-17.

234. *Id.*

235. George V. Launey, *Appraisal of Housewife's Services*, 29 RES GESTAE 306, 306 (1985) (discussing methods used by expert witnesses in courtroom to value household service).

236. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 6 (1995).

237. Ozawa & Kim, *supra* note 104, at 352 tbl. 5 (indicating women, on average, earn between \$304 and \$402 per month in social security insurance).

238. See QUAH, *supra* note 41, at 96-101 (citing 15 different studies providing estimates of market value of women's household services and effect inclusion of nonmarket activities would have upon gross national products).

239. See, e.g., *Legare v. United States*, 195 F. Supp. 557 (S.D. Fla. 1961) (holding that, when wife died because of negligent mismatching of blood during cesarean section, household entitled to recover for loss of wife's domestic services); Grace G. Blumberg, *Cohabitation Without Marriage: A Different*

The tort context, however, provides another disturbing example of how women's household labor continues to be unfairly treated by the law. Paralleling Congress's denial of traditional employee benefits and tax credits to women for their household labor, courts often deny women monetary awards for the loss of their ability to provide household labor, despite allowing family members to collect awards stemming from the loss of those services. In wrongful death cases, for example, the reward goes to the homemaker's family.²⁴⁰ Similarly, if an accident causes a woman to be incapacitated, many courts do not view the woman as having lost anything of value entitling her to damages, yet her spouse may have an action for loss of consortium.²⁴¹ Women's household labor, therefore, is left largely unrecognized in the courts just as it is in the Tax Code.

If Congress were to treat women's household labor similarly to market labor for taxation purposes, women would have access to social security and disability benefits that could serve as the basis for recovery of monetary awards in tort actions. Such awards would parallel those made for recovery for waged laborers' loss of potential earnings. In this way, taxation of household workers would increase women's access to resources when they perform housework and when a third party renders them incapable of doing the work.

B. DISTRIBUTIONAL CONCERNS

1. Policy Considerations: Imposing a Tax on Noncash Transactions

The second major policy objection to taxing household labor is based on the long-held belief that consumption of goods, services, and leisure activities purchased with income earned in the market largely determines economic well-being.²⁴² Because it is monetary income that enables one to consume, many argue that it is the most appropriate measure of economic well-being.²⁴³ Consequently, many tax theorists take the position that the tax base should be

Perspective, 28 UCLA L. REV. 1125, 1162 (1981) (noting courts' willingness to value women's services outside of marriage); Thomas F. Lambert, Jr., *How Much is a Good Wife Worth?*, 41 B.U. L. REV. 328, 328 (1961) (discussing courts' willingness to value household services); Launey, *supra* note 235, at 306 (an economist who has testified as expert witness about valuation of women's services for over 20 years discussing valuation methods).

240. Finley, *supra* note 54, at 52-53 (noting that "[m]ost tort books and tort cases are silent about why unpaid but crucially productive and important services such as household management and childrearing are consistently undervalued or overlooked in a system which gauges damages to the market economy"); see also Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 817 (1988) (citing 11 Eng. Rep. 854 (1861) for the proposition that the loss of a wife's services has traditionally been characterized as a material loss, whereas loss of a husband creates only "mental" or "emotional" loss).

241. Finley, *supra* note 54, at 53.

242. Berk, *supra* note 205, at 113-17 (discussing traditional microeconomic theory as ignoring activities of household members and assuming only work in the market yields utility).

243. RICHARD GOODE, *THE INDIVIDUAL INCOME TAX* 11, 21 (1975) (acknowledging that monetary income does not represent all taxpayer's wealth but defending income as primary index of one's ability to pay tax burden).

limited to monetary income.²⁴⁴

Although numerous economists now recognize that household labor as well as a market wage enables the family to consume, tax scholars continue to argue that only market transactions should be taxed.²⁴⁵ By imposing a tax only when the taxpayer voluntarily converts labor into a marketable form, Congress implicitly recognizes that only under those circumstances does the taxpayer have resources to pay a tax liability.²⁴⁶ Many tax analysts, therefore, adopt the "ability to pay" theory of taxation and argue that the income base is the fairest method for determining tax liability.²⁴⁷

The ability to pay theory, in its most basic sense, means that the taxpayer possesses resources that can be turned over to the State. Congress's concern that taxpayers do not unfairly suffer a tax burden without the ability to pay the tax is reflected in numerous contexts. Taxpayers, for example, are not required to pay tax on appreciated property until the property has been sold and the taxpayer realizes or "cashes out" the gain.²⁴⁸ Additionally, section 1031 of the Code exempts from taxation a "like-kind" property exchange. The qualifying section 1031 "like-kind" property exchange frees the taxpayer from an immediate tax burden even if the fair market value of the property received far exceeds the basis or the cost of the original property.²⁴⁹

Although the policy considerations associated with a taxpayer's ability to pay capture an underlying concern for tax fairness, Congress has ignored the taxpayer's financial status in many circumstances.²⁵⁰ For example, employee compensation in the form of retirement benefits is taxable when the retirement

244. See, e.g., Thuronyi, *supra* note 23, at 56 (stating that "taxes are paid in money and tax equity is, therefore, appropriately based on monetary factors").

245. See sources cited *supra* note 23.

246. Although this article is concerned with taxpayer liquidity problems, many tax analysts have addressed the "ability to pay" theory in the context of marginal tax rates. The argument for progressive taxation, for example, is based on the notion that the utility curve for income slopes down as income rises. Higher marginal tax rates for higher wage earners, therefore, take into consideration a taxpayer's ability to pay and imposes an equal tax burden on taxpayers at all income levels. See BLUM & KALVEN, *supra* note 77, at 29-45 (discussing fundamental principles of progressive taxation); Bankman & Griffith, *supra* note 77, at 1910-18 (analyzing moral underpinnings and effects on societal welfare of progressive taxation); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 490-518 (1987) (contrasting traditional philosophies justifying flat taxation with feminist perspective favoring progressive taxation); see also M. Slade Kendrick, *The Ability-to-Pay Theory of Taxation*, 29 AM. ECON. REV. 92 (1939) (discussing alternative justifications for progressive taxation based on preference for certain social consequences over others).

247. See sources cited *supra* note 23.

248. *Eisner v. Macomber*, 252 U.S. 189 (1920) (imposing realization requirement upon definition of income). In certain circumstances, however, taxpayers must pay a tax without regard to liquidity. Taxpayers who choose the accrual method of accounting, for example, are required to pay tax on income to which they have a legal right but may not have received.

249. I.R.C. § 1031 (1994).

250. In addition to tax fairness, tax theorists and reformers generally agree that good tax policy incorporates notions of administrative feasibility and soundness of economic effects or economic rationality. KLEIN & BANKMAN, *supra* note 23, at 19. But see Thuronyi, *supra* note 23, at 45-53 (noting that tax scholars subordinated fairness issues when formulating definition of taxable income).

fund fails to satisfy certain Employee Retirement Income Security Act requirements regardless of whether the employee has access to income to pay the tax.²⁵¹ Taxation in this context is not related to the availability of cash but turns on important public policy concerns, such as the low-income worker's access to retirement funds. Barter exchanges, in which taxpayers exchange property or services, also can produce a tax liability despite no money ever exchanging hands in the transaction.²⁵² Finally, original issue discount bonds accruing interest over the course of years are also immediately taxable, even though the investor may not have access to the interest for several years.²⁵³

Not only does Congress in some cases impose a tax when no money has exchanged hands, but it fails to tax numerous transactions that improve a taxpayer's financial status. For example, income obtained through gift transfers and property inheritances is not taxable, despite the donee's improved economic position.²⁵⁴ In addition, recoveries in tort for personal injury are also exempt from taxation under section 104 of the Tax Code, even though the monetary recovery would enable easy payment of a tax burden.²⁵⁵ Therefore, although the transfer of cash may reflect a taxpayer's ability to pay a tax burden, access to monetary resources is often irrelevant to Congress's decision to impose a tax. Thus, Congress could make the policy choice to tax household labor without violating any firm principle embodied in the Tax Code.

2. Low-Income Taxpayers' Ability to Pay the Increased Tax Burden

Taxing nonwaged household labor has the potential to impose extreme economic hardship on low-income families. Imputing income to households for women's domestic labor would increase families' tax burdens and possibly cause a loss of refundable earned income tax credits along with other tax benefits.²⁵⁶ In some cases, an increased tax burden may decrease the resources needed to purchase everyday necessities. Under those circumstances, low-income women might prefer to forgo potential future security to avoid paying an increased tax burden in the short run, despite losing the long-run economic

251. Section 501 of the Code exempts from taxation pension arrangement trusts that meet the requirements of I.R.C. § 401. I.R.C. § 501 (1994).

252. I.R.C. § 61 (1994); Treas. Reg. 1.61-2(2)(d)(1) (1995).

253. I.R.C. § 1272 (1994) (requiring taxpayer to include interest from debt obligation with original issue discount into gross income whether or not taxpayer actually receives interest payment).

254. I.R.C. § 102 (1994) (excluding most gift transfers from income); I.R.C. § 1014 (1994) (noting basis of property acquired from decedent is fair market value at time of decedent's death).

255. I.R.C. § 104 (1994). Numerous policy justifications, however, exist for the exclusion of recoveries due to pain and suffering. It could be argued, for example, that because the award is a replacement of human capital, it should not be taxed because the taxpayer has, in fact, enjoyed no real gain.

256. The earned income tax credit under § 32 and the childcare credit available under § 21, for example, are tied to the taxpayer's level of income. As income reaches a certain level, the tax credit available begins to phase-out. I.R.C. §§ 21, 32 (1994); *see also infra* notes 284-90 and accompanying text (discussing phase-out aspect of these provisions).

benefits in retirement.²⁵⁷ Imposing a tax on household income has the potential, therefore, to further impoverish the most vulnerable women in our society.

Some feminists have avoided the problem of an increased tax burden by arguing that Congress could simply tie social security credits to household labor, thereby ensuring women's access to the benefits for the work they perform.²⁵⁸ These proposals recognize the productive nature of women's household labor, while at the same time providing women with access to economic resources through the tax structure.

In adopting the first social welfare programs, early policymakers attempted to ensure cash transfers to women in recognition of the division of labor in the home along gender lines.²⁵⁹ Many policymakers, however, no longer seek to subsidize women's role in the home; instead, they question the very legitimacy of these social welfare programs. They argue women must now "earn" their benefits by working in the waged labor force to some extent.²⁶⁰ Indeed, women who obtain income through the current welfare programs without working in the paid labor force are perceived to have deviant family values, to be lazy, and to be undeserving of the cash transfers.²⁶¹ In the current political climate, proposals that award benefits without burdens could potentially fall into the welfare conundrum that characterizes women with children as unworthy of state assistance.

Incorporating the value of women's labor into the current tax structure has the potential to transcend the current social welfare discourse. If Congress broadened the tax base to include nonmarket labor, both waged and unwaged

257. The Employee Retirement Income Security Act's antidiscrimination rules have been criticized for precisely this reason. Congress adopted the ERISA antidiscrimination rules to ensure that both low-income and high-income wage earners have access to pension benefits under the employer-established pension fund. As Bruce Wolk has pointed out, low-wage employees have greater immediate consumption needs than high-wage employees and thus are less willing or able to save. Indeed, "[f]or such employees a mere dollar-for-dollar substitution of retirement savings for wages would not maintain their level of satisfaction; wages would have to be increased." Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419, 430-31 (1984); see also Joseph Bankman, *The Effect of Anti-Discrimination Provisions on Rank-and-File Compensation*, 72 WASH. U. L.Q. 597, 603 (1994) (noting that low-income wage earners often prefer to have access to immediate income rather than to defer access to funds until retirement under employer pension fund, thus potentially prompting employers to hire high-wage earners who are willing to forgo immediate wage).

258. See, e.g., Becker, *supra* note 111, at 285-88 (1989) (discussing number of methods devised to ensure women have access to social security based on work performed in home).

259. See Gwendolyn Mink, *Welfare Reform in the Historical Perspective*, 26 CONN. L. REV. 879, 883-87 (1994) (discussing "maternalists'" approach to welfare reform and arguing that early reformers naturalized gendered division of labor).

260. Alstott, *supra* note 78, at 536-44 (discussing bipartisan support for earned income tax credit program because it has largely been seen as work-based welfare reform and not free "handout"); Mink, *supra* note 259, at 881 (noting that when politicians call for "ending welfare as we know it," they generally mean society must force poor women into marketplace).

261. Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 836-37 (1994) (discussing negative images and how those images have been used by social critics to demean women, especially black women).

laborers would suffer the same burdens and have access to the same benefits derived from taxation. In short, Congress would treat women who perform household labor as having *earned* their benefits in the same manner as waged laborers.²⁶²

Rather than declining to tax nonmarket labor altogether, Congress could offset the financially burdensome effects of taxation on low-income taxpayers by extending the current tax structure that has been established precisely for this purpose. Congress adopted the earned income tax credit program ("EITC") to offset the burden of taxation on low-income wage earners. Congress could adopt a program similar to the EITC to offset the tax on value imputed to the household for self-supplied services. The proposed "household income tax credit" ("HITC") is discussed in Part V.

C. BEHAVIORAL AND CULTURAL CONCERNS

In addition to the practical problems of taxing household labor discussed above, many theorists have concerns about the "commodifying" effects of valuing nonmarket goods and services in market terms.²⁶³ In this section, I explain the debate over commodification of household services and the three issues upon which it has centered. First, some theorists have taken the position that by taxing nonmarket labor, Congress will push women into the market to pay the tax, thereby forcing them to commodify their services. Taxing nonmarket services could, therefore, impose the demeaning effects of the market upon women who would have chosen to stay out of the market absent the tax. The second difficulty with taxation involves the impossibility of capturing the value of the labor in market terms, or its incommensurability. Finally, some feminists argue that problems exist with the mere use of market rhetoric to describe household labor. In particular, the description of nonmarket labor in market terms could demean women by reducing them to an "abstract fungible unit."²⁶⁴

Mark Kelman has articulated the behavioral incentives associated with valuing or commodifying unwaged labor and has noted that they are related but not identical to the ability to pay issue. Valuing and taxing a service for which the taxpayer receives no wage would impose a financial burden that could, in effect, encourage people to sell their labor for money simply to pay the tax. Unlike the traditional concern with taxpayer liquidity, Professor Kelman's concern is that

262. See Nancy J. Altman, *The Reconciliation of Retirement Security and Tax Policies: A Response to Professor Graetz*, 136 U. PA. L. REV. 1419, 1424-34 (1988) (discussing connection between public conception of earned benefits and viability of social welfare programs).

263. Although many commentators acknowledge philosophical problems associated with commodification, not all agree it is a bar to taxation. Thomas Griffith, for example, acknowledges the problems associated with commodification but argues that a resistance to commodification does not underlie the exclusion of most imputed income from the tax base. Rather, most objections are based on the assertion that "imputed income" is not income at all and therefore has no place in the tax base. Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343, 383 n.208 (1989).

264. Radin, *supra* note 30, at 1885 (observing that universal market rhetoric undermines our conception of personhood).

taxation of household labor would force taxpayers into the market against their will.²⁶⁵ By imposing a tax only when laborers voluntarily convert their labor into marketable form, Kelman argues, Congress respects the libertarian principle that the state should not require people, directly or indirectly, to engage in particular activities. Kelman also takes the position that by adhering to the market/nonmarket distinction, the current tax system respects a person's refusal to treat potentially marketable resources as commodities—"a desirable anticapitalist strain in our market obsessed culture."²⁶⁶

Kelman is concerned with the tax structure's potential to influence behavior and the commodifying effects of those influences. As he notes, taxing citizens on their *earning capacity* poses serious problems. Congress should not, for example, force a beach bum to work as a doctor even if she has a medical degree.²⁶⁷ While the argument is persuasive with regard to the beach bum, it is less persuasive in the context of women's household labor. Unlike a tax on the beach bum, a tax on the benefits from household activities would not force most taxpayers to undertake a different type of activity, but instead would recognize the labor as valuable. Taxing earning capacity is far more problematic than imposing a tax on earned income.

Professor Kelman, however, argues against taxation in both circumstances. With regard to taxation of household labor Kelman approves of the very influences that disturb market-oriented scholars. While Kelman advocates nontaxation because it enables taxpayers to stay out of the market, the market-oriented scholars argue it is precisely that influence that leads to the economic impoverishment of women. Kelman, however, fails to distinguish between the Code's behavioral incentives and the actual effects of the incentives, and as a result, seems to overstate his case in the very same way the market-oriented theorists do. The Code might encourage taxpayers to commodify their labor, but empirical data is needed to determine the extent to which the Code actually causes commodification.

As discussed above, data does not support the argument that nontaxation enables women to stay out of the market. Although a small number of women might respond to a change in taxation, most women are currently in the market for a variety of reasons, including the personal preference to hold a waged job or simply economic need. By declining to value and tax nonmarket labor, therefore, Congress probably has little success in protecting women from commodification. Indeed, as the market-oriented scholars note, even if Congress does enable some women to avoid the market, it is not at all clear that women benefit from staying out of the waged labor force.

265. Kelman, *supra* note 28, at 841-42 (noting that although taxation based upon earning capacity may be ideal measure of ability to pay, it would result in forced marketing).

266. *Id.* at 880; *see also* Stephan, *supra* note 195, at 1365 n.12 (arguing Kelman's acceptance of tax on market laborers because such labor exchanges are "voluntary" ignores Marxist perspective on influence of social structures over individual choice).

267. Kelman, *supra* note 28, at 842.

Feminist commentators outside the tax area have not focused on the manner in which valuation and taxation might force women into the market; rather, they are concerned that valuing and taxing household labor would commodify and demean women even if they stay in the home. These feminists argue that because there is no true market replacement for women's household labor, valuing it in market terms would be inappropriate because it could only lead to inaccurate congressional estimates of the labor's worth.²⁶⁸

In numerous other contexts, society has debated whether it is appropriate to use market terminology to value nonmarket goods and services. In *Morals and Markets*, Viviana Zelizer articulately describes the problems associated with characterizing human value in market terms during the development of the life insurance market.²⁶⁹ She explains that although religious leaders, politicians, and most American citizens were initially offended by the notion of valuing human life in market terms, most have come to support the insurance industry.²⁷⁰ This acceptance was, in large part, due to the distinction made between valuing human life and providing economic protection primarily for widows and children. The insurance industry took the position that it was only attempting to ensure financial security for unwaged laborers. Indeed, the companies argued to the public that paid protection for widows and children was not only efficient, but a "morally superior system."²⁷¹ This approach provides a worthwhile model for the taxation of housework—Congress could acknowledge the incommensurability of women's household labor, while still tying economic resources to the artificial market value imputed to the work.

In response to this approach, Margaret Jane Radin argues that merely using market rhetoric and terminology to describe and analyze women's work might cause people to regard women as fungible waged laborers rather than willful persons worthy of respect.²⁷² Radin concludes that market rhetoric can do

268. I thank the participants at the Columbia Law School Feminist and Legal Theory Workshop in February 1995 for clarifying my thoughts on this point. For a more extensive discussion on the incommensurability of women's labor, see Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71, 80-87 (1990).

269. VIVIANA A. ROTMAN ZELIZER, *MORALS & MARKETS: THE DEVELOPMENT OF LIFE INSURANCE IN THE UNITED STATES* (1979) [hereinafter ZELIZER, *MORALS & MARKETS*]. For a discussion of similar issues raised in the context of children, see VIVIANA A. ROTMAN ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985) [hereinafter ZELIZER, *PRICING THE PRICELESS CHILD*].

270. ZELIZER, *MORALS AND MARKETS*, *supra* note 269, at 91-117 (discussing widespread social criticism of life insurance and its eventual acceptance).

271. *Id.* at 94-95 ("Institutionalized charity and bureaucratized altruism were depicted as the necessary and positive developments of a higher stage of mankind.").

272. Radin, *supra* note 30, at 1885 (describing harmful effects of universal market rhetoric); *see also* Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 295-96, 304 (1991) (concluding that people could have difficulty perceiving friendship with dignity if we begin to think of each other as having only limited value or only as a means to pursue ends). Although "[p]erceiving the use of humans as resources might alter sensibilities through association of persons with objects; preventing us from thinking of others as humans," *id.* at 304, Altman notes that this ignores real-life counterexamples. *See id.* at 308-11 (asserting that although people purchase pets for varying prices based on preferred characteristics, most people do not perceive their pets as investments, but develop personal relationships with their animals).

violence to our notion of personhood.²⁷³ She notes:

Universal market rhetoric transforms our world of concrete persons, whose uniqueness and individuality is expressed in specific personal attributes, into a world of disembodied, fungible, attribute-less entities possessing a wealth of alienable, severable "objects." This rhetoric reduces the conception of a person to an abstract, fungible unit with no individuating characteristics. . . .

Market rhetoric invites us to see the person as a self-interested maximizer in all respects. Freedom or autonomy, therefore, is seen as individual control over how to maximize one's overall gains.²⁷⁴

By using market rhetoric to describe and value women's household services, therefore, taxation could lead society to view women as profit-maximizers worth only the dollar value of the services.

Valuing women's household labor in market terms, however, does not necessarily mean the unique and irreplaceable character of the labor will be minimized. As Radin notes, some housework (such as making the bed or cooking a meal) is fungible and can easily be bought in the market. Yet, the existence of paid domestic laborers has not caused us to ignore or devalue the personal or individualized aspects of unwaged labor, such as love and caring.²⁷⁵

Indeed, nonmarket and market aspects of labor exist simultaneously in many contexts. Labor performed outside of the household, for example, is valued in market terms, and market rhetoric is used to describe such aspects of our lives, yet the labor is not completely commodified. In addition to a wage, for example, many market participants like their jobs and obtain significant "psychic" benefits despite exchanging their labor in the market for money. Thus, as Professor Radin acknowledges, what we derive from our work and the importance we attach to it cannot be understood entirely in terms of money.²⁷⁶ Market valuation and taxation of waged labor has not led to a complete commodification of waged laborers; therefore, there is no reason to believe that valuation and taxation of women's household labor would lead to complete commodification. Indeed, the unique and irreplaceable aspects of women's household labor would remain outside the scope of any attempt to value the work.²⁷⁷

273. Radin, *supra* note 30, at 1885 (arguing commodification fosters social context that disregards personal values and impairs our ability to think and feel in way that makes what is sold more meaningful than its exchange value).

274. *Id.*

275. *Id.* at 1923 n.260 (noting that domestic services market coexists with "parallel class of unpaid providers").

276. *Id.* at 1918-21 (observing that even though a "house has market value and we can express our investment in terms of dollars, there is a nonmonetizable, personal aspect to many people's relationships with their homes").

277. *Id.* at 1923 (noting that many relationships have both market and nonmarket aspects); *see also* Silbaugh, *supra* note 40, at 28-31 (arguing there is no need to reject emotional aspects of housework to recognize economic similarities between housework and marketwork).

Although market terminology is incapable of capturing all aspects of women's labor and has the potential to lead society to value women only as fungible objects, valuing and taxing household labor could also be a source of empowerment. In particular, if Congress taxed housework, women who perform services for their homes would have access to employee benefits and retirement funds. This step would do much to alter the existing gender hierarchy for women who are unable to be full participants in the market economy.²⁷⁸

Finally, refusing to value women's household labor in market terms will not protect women from commodification. As Stephen Schnably notes, the family has become a source of commodification, not a refuge from it. In fact, the "cult of domesticity" relegating women to the private sphere played an integral part in the rise of our consumer-oriented culture.²⁷⁹ Household services are performed with commodities sold in the market and women are often the targeted audience for the advertising campaigns.²⁸⁰ Therefore, unpaid labor in the household is not safe from market influences, but "is deeply entrenched in the entire system of commodity production."²⁸¹

Indeed, many Marxist scholars have argued that market employers have already indirectly commodified women's unpaid labor in the determination of men's market wages. Alejandro Portes argues that market wages are not just payment for productivity, but are determined by the costs of maintaining and reproducing the labor force, which are tasks usually undertaken by women in the household.²⁸² Thus, the level of men's wages are dependent on women's role in the traditional gendered division of labor in the home. If women perform free labor in the household, the market wage for men's labor remains deflated. The market economy, therefore, accounts not only for the labor of the waged

278. See Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1715-45 (1993) (tracing historical notions of racial identity and property, and noting that although the consumer culture is offensive because it is often based on racist and sexist notions, women and people of color have also been denied access to economic benefits available only in market and in market terms); Radin, *supra* note 30, at 1915-17 (observing that universal noncommodification might only exacerbate economic disparities between classes and genders by preventing needy groups, especially poor women, from selling their services for food and shelter). But see Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 369 (1993) (noting that commodification might only embed women deeper into existing structures of race, gender, and class discrimination).

279. Schnably, *supra* note 278, at 390 (linking woman as homemaker with rise of consumer culture).

280. Stephen J. Schnably, *Normative Judgment, Social Change, and Legal Reasoning in the Context of Abortion and Privacy*, 13 N.Y.U. REV. L. & SOC. CHANGE 715, 860 (1984-85). However, as Radin notes, closely analyzing the problematic nature of commodification might cause us to question our current market orientation and our tolerance of objectification. There is, therefore, moral value to limiting further objectification because it could result in decommodification. Margaret Jane Radin, *Reflections on Objectification*, 65 S. CAL. L. REV. 341, 343 (1991).

281. Schnably, *supra* note 278, at 390 (commenting on role of unpaid domestic labor in consumer culture).

282. Alejandro Portes, *The Informal Sector and the World-Economy: Notes on the Structure of Subsidized Labor*, in *URBANIZATION OF THE WORLD ECONOMY* 53, 54 (1985) (noting that formal economies depend on informal sector, and this dependency is tied to availability of women's unwaged labor in home); see also Acker, *supra* note 225, at 474 (arguing that women's unpaid labor is essential to meet needs of capitalist system).

workers, but for the labor of their family as well.²⁸³

Radin, Kelman, and others articulate the dilemma involved in commodifying nonmarket activities. Valuation of housework in market terms threatens to demean women by promoting the idea that women are fungible objects. At the same time, however, commodifying the labor could help ensure women have access to valuable social welfare benefits. Taxation of housework implicitly recognizes the productive nature of women's labor and therefore, on balance, is more likely to empower than oppress women. Although moving away from a consumer-oriented culture is an important feminist goal, that goal must be pursued in a manner that does not impoverish the very women who are the intended beneficiaries.

V. LIMITING THE DISTRIBUTIONAL EFFECTS OF TAXATION: A PROPOSED HOUSEHOLD INCOME TAX CREDIT

In this Part, I return to the financial difficulties that low-income women will experience if Congress broadens the tax base to include the value of household labor. Although taxation of household labor has the potential to ensure women's access to independent social welfare benefits, it will simultaneously impose an immediate financial burden upon women and their families. This additional burden is particularly problematic for low-income women who often need every available dollar to purchase necessities, such as food and childcare. Because this burden might outweigh the value of future benefits, some women will prefer to forgo long-term social welfare benefits to avoid taxation in the short-run.

This same trade-off is present when women are in the waged labor force. Low-income women must pay income and payroll taxes that take resources needed for everyday living expenses. Congress, in response to the problems associated with the burdens of taxation on low-income wage earners, has rejected the conclusion that low-income taxpayers must choose between long-term and short-term financial stability. In 1975, Congress created the earned income tax credit ("EITC") program, which aims to offset the tax burden of low-income workers while maintaining access to social welfare benefits.

The EITC, found in section 32 of the Code, entitles a low-income wage earner to a refundable tax credit based on income level and the number of children in the household. For example, the program entitles a family with one child earning \$6000 to a subsidy of thirty-four cents for every dollar earned.²⁸⁴ The credit is capped at \$2040 and phases out at a rate of sixteen cents for every dollar earned over \$11,000.²⁸⁵ The credit completely phases out when taxpayer

283. Portes, *supra* note 282, at 53, 58 (arguing that informal sector subsidizes costs of capitalist enterprises).

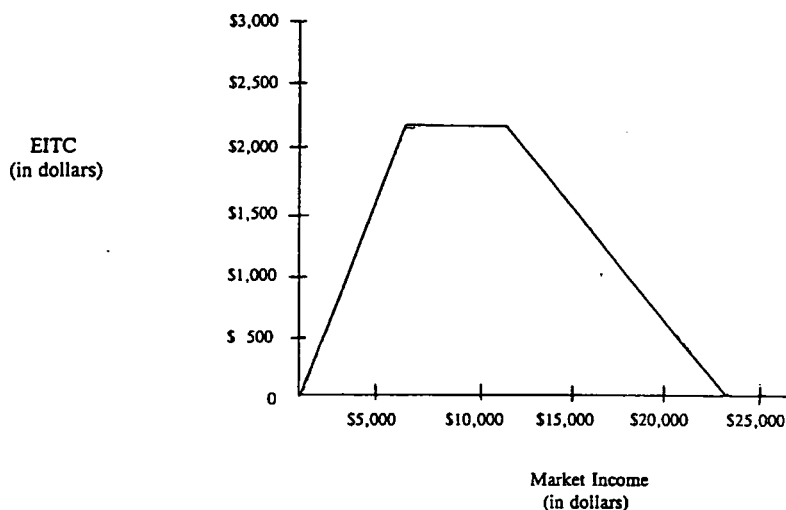
284. I.R.C. § 32 (1994).

285. To be more precise, the credit begins to phaseout at a rate of 15.98% for every dollar earned over \$11,000. I.R.C. § 32(b) (1994).

earnings equal \$23,760.²⁸⁶ As a *refundable* credit, the EITC not only reduces or eliminates federal income tax liability, it also pays cash to low-income taxpayers whose EITC exceeds the tax owed.²⁸⁷ Therefore, the EITC program has greater redistributive potential than the *nonrefundable* childcare credit provisions, which only permit the taxpayer to offset tax liabilities.

Despite some criticism, the EITC has gained widespread support because of its distributional effects and behavioral incentives.²⁸⁸ The EITC program redistributes income by providing financial support to low-income families. In addition, because families only receive the EITC for income earned in the market, the program gives taxpayers an incentive to work in the paid labor force. Indeed, at very low income levels, the credit increases as income rises. Graph 1 demonstrates how the EITC increases, plateaus, and phases-out for a family with one child.

Graph 1: EITC
(for family with one child)



To ensure low-income women are not harmed by the inclusion of household labor in the tax base, Congress could adopt a household income tax credit ("HITC") that parallels, but does not mirror, the EITC. The distributional and behavioral effects of the HITC would be far more limited than those found in the EITC. The purpose of the HITC would be to offset only the increased tax

286. The credit for a family earning \$23,760 would be zero because $(.34 \times 6000) - [.1598 \times (23,760 - 11,000)] = 0$. See Alstott, *supra* note 78, at 541 & n.38 (discussing tax credit for low-income family with two children and calculating available benefits); Timothy J. Eifler, Comment, *The Earned Income Tax Credit As a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 713-15, 750-55 (1994) (discussing tax credit for families of various sizes and income levels).

287. Alstott, *supra* note 78, at 534 (describing policy goals of EITC); Yin et al., *supra* note 218, at 230 (outlining objectives of EITC).

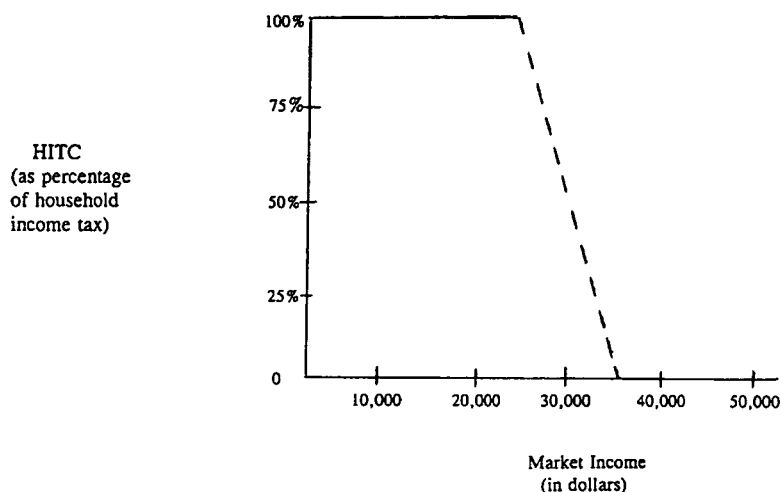
288. Alstott, *supra* note 78, at 533-92 (outlining prevailing arguments for and against EITC and critically evaluating program).

imposed on household labor and not to operate as a tax-based social welfare program similar to the EITC. An HITC, therefore, should have a distributional character similar, but not identical, to the EITC. An HITC, like the EITC, should base eligibility on income-level and family size. The HITC, however, should be a nonrefundable rather than a refundable tax credit. Thus, while the HITC could decrease or eliminate the tax burden, it would not provide a cash transfer similar to the EITC program.

Additionally, because the HITC will not reward women for entering the market, it will lack the incentive structure found in the EITC. The HITC would be tied to the tax imposed on household labor, and thus the credit would provide almost no behavioral incentive for the taxpayer to move into the market.²⁸⁹ Indeed, by tying the credit to nonwaged labor, an HITC would arguably provide an incentive for women to stay in the home.

The structure of the HITC must ensure women at low-income levels and women who depend on social welfare programs have a credit that entirely offsets the increased tax burden imposed on household labor. Like the EITC, the HITC should begin to phase out as income rises. The speed at which the credit phases out will, of course, depend on the value Congress imputes to the household labor and the resultant tax. Graphs 2 and 3 demonstrate how the HITC could provide financial assistance to a family with one child based on income level.

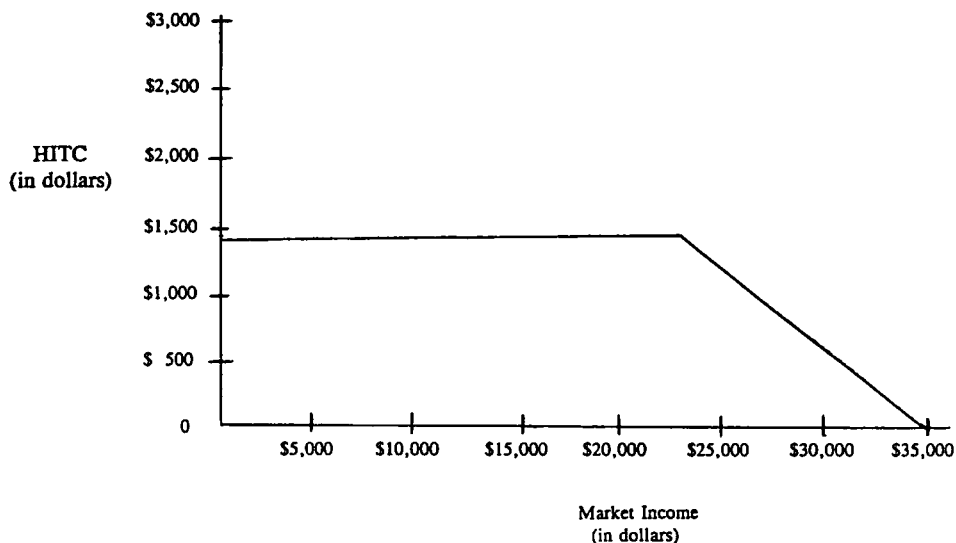
Graph 2: HITC
(for family with one child)



289. The failure of the HITC to provide a market incentive, however, might pose significant political hurdles. As many commentators have noted, the public is often more willing to support work-based programs than need-based programs. See Alstott, *supra* note 78, at 536-44 (discussing the conception of EITC as work-based tax program and widespread support for this type of tax reform); Minnow *supra* note 261, at 817-38 (discussing "new consensus" on welfare reform and notion that responsible social welfare means providing market incentives).

This hypothetical HITC would avoid the imposition of an additional income or payroll tax on nonwage earning families and on all families entitled to any credit under the EITC program. Thus, as Graph 2 indicates, taxpayers with earned income between \$0 and \$23,760 will be entitled to a credit that completely offsets the tax on household income. Taxpayers with income that exceeds \$23,760 will be within the phase-out range. Of course, the greater the tax, the slower the credit should phase out. Graph 3 represents an HITC worth \$1392 that would phase out at a rate of approximately twelve cents for every dollar that exceeds \$23,760, fully phasing out at \$35,000.²⁹⁰

Graph 3: HITC
(for family with one child)



The household income tax credit, like the EITC, will ensure that low-income women avoid a tax liability while still gaining access to social security benefits. The HITC, however, will offer little or no income assistance to middle- and upper-income women²⁹¹ and may potentially decrease middle- and upper-

290. The HITC is calculated to offset a tax burden of \$1392. As discussed later in the article, a single woman with one child who does not work in the paid labor force performs approximately 42 hours per week of household labor. Calculated at minimum wage levels, she provides approximately \$9282 of household income to her family. If she paid social security at a rate of 15% on this amount, she would owe \$1392 in payroll taxes. See *infra* notes 308-15 and accompanying text.

A credit that is equal to \$1392 will completely phase-out at \$35,000 because $[(35,000 - 23,760) \times .1238] - 1392 = 0$.

291. Because single women with children are by far the most economically impoverished, Congress could provide a credit that offsets the entire tax burden associated with the imputed value of household services. Adopting an HITC that provides a complete tax credit for single women will not only ensure against further economic vulnerability under the proposed tax, but would also offset the burdens single women currently suffer under the Code and in the market. Payments for social security and private pension benefits, for example, are calculated to assure availability of derivative spousal benefits.

income women's disposable resources. But this would occur only if women had access to such income prior to the imposition of the tax.²⁹² Households, however, do not equally share income and expenses. Married women tend to use a large portion of their income for family necessities, leaving greater disposable income for their husbands. If the new tax burden is, by necessity, paid out of the disposable income, then the taxation of housework might work more to the detriment of married men than married women.

If the household unit equally shares income and expenses among its members, the burden of the new tax will be shared by the entire household, including the woman. Under these circumstances, this approach will arguably cause less economic hardship on women than the current approach that leaves women without significant economic resources in old age. Women generally live longer than men and often have a low level of social security benefits; as a result, women frequently spend the last years of their lives in poverty. By taxing housework, Congress would require the entire family to contribute to women's economic security in retirement.

VI. POLICY IMPLICATIONS OF INCORPORATING THE VALUE OF WOMEN'S HOUSEHOLD LABOR INTO THE TAX BASE

Although Congress's distinction between market and nonmarket gains may have once reflected good tax policy, this dichotomy no longer withstands close scrutiny. First, economists now generally recognize the productive nature of household activities and have devised methods for valuing the labor that mitigate administrative concerns associated with taxation of nonmarket labor. Second, Congress could deal with legitimate distributional concerns by providing a tax credit to offset the additional burden imposed on low-income wage earners. Finally, concerns about commodifying effects on the taxpayer are less persuasive when compared to the impoverishment women suffer due to their inability to secure social welfare benefits. In short, the problems associated with taxing housework no longer justify categorical rejection of the idea.

Consequently, single women are required to pay higher rates into the system yet do not have a spouse receiving the benefits, nor do single women obtain increased benefits themselves. In short, single wage earners subsidize married wage earners' spousal benefits. See, e.g., Rolande Cuvillier, *The Housewife: An Unjustified Financial Burden on the Community*, 8 J. Soc. POL'Y 1, 1-27 (1979) (arguing that housewife should pay tax on housework). But see McCaffery, *supra* note 1, at 996-1001 (noting that married women are penalized by social security structure, which taxes them but does not provide significant independent benefits). The HITC could alleviate some of the burden Congress and employers have imposed upon single women by ensuring that women are entitled to social security and disability benefits while not subjecting them to taxation. Thus, a modified tax base that includes the value of household labor would theoretically impose an additional tax burden on single women. The HITC, however, would offset the tax while ensuring single women access to income in retirement and in times of unemployment.

292. Upper-income single women will undeniably have a loss of disposable income. They presumably have complete control over the family's resources but will not be entitled to the credit under the HITC.

Resolving valuation, liquidity, and commodification difficulties does not, however, address a number of other tax policy issues that would arise if Congress taxed the value of household labor. In this Part, I briefly address two policy issues that my proposal raises: taxpayer identification and aggregation of household income and income obtained from market activities. I then illustrate the potential effects of taxing housework using three hypothetical taxpayers.

A. IDENTIFYING THE APPROPRIATE TAXPAYER

1. Income Taxation

Pursuant to section 61 of the Tax Code, Congress requires individuals to pay an income tax on all economic gains. Congress does not distinguish between the receipt of cash and the receipt of property or services when imposing a tax on the recipient of the economic gain. The benefits of women's household labor easily fall within these tax principles.²⁹³ The services women provide to the family when they cook meals, shop for groceries, and pay the bills are widely perceived to increase the family's overall economic status. The labor is valuable in market terms, and most families would seek a market substitute if the wife or mother were unable to provide the services. Women's household labor, therefore, provides an economic benefit to the family that should be subject to taxation under section 61 of the Code.

Congress, however, must still identify the appropriate taxpayer. Generally, the tax structure imposes a tax on the taxpayer with control over the resources. The wage earner or the owner of the income-producing property is generally responsible for paying the income tax.²⁹⁴ It is difficult, however, to exercise control over the benefits of household labor. Unlike a wage in the market that is earned and consumed by one family member, the entire family receives the material benefits of women's labor.²⁹⁵ Because each member of the family obtains an economic benefit, each should be responsible for a portion of the income tax liability associated with household services.²⁹⁶ Under this approach, parents and children will theoretically each incur an income tax burden. Section 6201(c) of the Code, however, holds the parent responsible for the child's tax

293. Indeed, if the labor were performed for a taxpayer outside the woman's family, the benefits from the labor would be taxable. Treas. Reg. § 1.61 (1994).

294. Michael J. McIntyre, *Tax Justice for Family Members After New York State Reform*, 51 ALB. L. REV. 789, 792-93 n.17 (1987) (discussing recent studies on issue of marital sharing of economic benefits).

295. Although the woman could refuse to perform household labor in the same way a man can refuse to share income, to the extent the chore is undertaken, it benefits the entire family. House cleaning, for example, provides benefits to every family member living in the home. See Silbaugh, *supra* note 40, at 12-14.

296. This is consistent with current taxation under the joint return system that assumes shared consumption of resources. See Zelenak, *supra* note 5, at 354-55 (differentiating between shared consumption and shared control). Although this assumption is erroneous in some situations, see *supra* notes 87-100 and accompanying text, households, in fact, do share the benefits of women's labor.

burden when the child is unable to pay.²⁹⁷ In practice, therefore, parents will be primarily responsible for paying the tax on the household income.

2. Payroll Taxation

Unlike the income tax, which Congress imposes upon all economic gains, Congress imposes the payroll tax only upon earned income. Wages and salaries, therefore, are subject to both payroll *and* income taxation while investment income is subject *only* to income taxation. Although the family receives income from women's household services, it is not clear that women themselves receive compensation that should be subject to the payroll tax.

Some courts and commentators have contended that women receive compensation for their household labor in the form of food and shelter.²⁹⁸ This characterization, however, assumes women work only in the home and rely upon a wage earner for economic resources. Although some women fit within this traditional gender role, many work in the paid labor force and use their salaries to purchase the family's everyday living necessities. In short, many women provide the food and shelter as well as the household services. Not only does this characterization of the home fail at a descriptive level, but it also creates normative problems. Imputed wages would vary from household to household depending on spousal income, and tax administrators would see single women as deserving nothing in exchange for the services they provide.

Rather than assuming women receive a wage in the form of food and shelter for their domestic service, Congress could impute a wage to women based on the *value* imputed to the household labor.²⁹⁹ Imputing a wage to women subject to payroll taxation fits within the underlying conceptual basis of the social security program. Congress designed the system as a social insurance program, intending to ensure income security for retired taxpayers. By paying into the program, women attain economic security that the current system fails to

297. I.R.C. § 6201(c) (1994).

298. See Wolk, *supra* note 19, at 1249-50 (1980) (discussing Tax Court's position that shelter, food, and living needs provided by a man to a woman for her domestic services is compensation for those services). But see Rucci v. Rucci, 181 A.2d 125, 127 (Conn. 1962) (noting that wives have duty to perform domestic services without compensation).

299. It is not unusual for the Internal Revenue Service to impute a wage to taxpayers for payroll purposes. In the corporate context, for example, the IRS will impute a wage to a taxpayer seeking to evade taxes. Corporation shareholders, for example, serving as officers, directors, or employees are often entitled to both shareholder's distributions and compensation for services provided to the corporation. Because compensation is subject to both income and payroll taxes, often the shareholder seeks to forgo a salary in lieu of a larger shareholder distribution. In response to this maneuver, the IRS has taken the position that the shareholder will be deemed an employee receiving a wage subject to the federal employment taxes. See, e.g., Radtke, S.C. v. United States, 712 F. Supp. 143 (E.D. Wis. 1989), *aff'd*, 895 F.2d 1196 (7th Cir. 1990) (holding that dividends paid to sole shareholder/employee were wages subject to payroll taxes). Even when the shareholder/employee receives no immediate payments, he or she might be responsible for income and payroll taxes. Pension benefits that do not qualify under the Employee Retirement Income Security Act, for example, may spark an immediate income and payroll tax even though the taxpayer will not receive the benefits until retirement. I.R.C. §§ 402-03 (1994) (exempting pension funds from taxation if fund satisfies statutory requirements).

provide.³⁰⁰

Additionally, Congress has tied social security benefits to wage levels and the length of the taxpayer's employment in an effort to provide benefits that would approximate the taxpayer's standard of living during the years in which he or she was physically able to perform productive labor.³⁰¹ Household services are productive because they raise each family member's standard of living. By subjecting household labor to payroll taxes Congress would acknowledge the value of the labor and at the same time provide old-age and disability benefits that more accurately reflect earlier standards of living.

B. AGGREGATION OF MARKET INCOME AND HOUSEHOLD INCOME

In addition to the policy questions that arise with identifying the appropriate taxpayer, there will be tax effects if Congress requires aggregation of imputed income from household activities and income obtained from market transactions. Stacking household income on market income, for example, could cause some taxpayers to experience the following externalities: to lose tax credits tied to their income level (such as the childcare credit or the earned income tax credit discussed above); to be thrown into a higher marginal tax rate imposing significant tax increases; or to lose entitlements to cash-transfers under various social welfare programs.

Congress could avoid these effects by mandating taxpayers use a separate form for reporting income imputed to the household for women's nonmarket labor. By separating market and nonmarket income, Congress could prevent the imputed economic gain associated with household services from having significant derivative effects on each person's tax status. The household income tax credit would offset only the income declared on the separate form used for reporting household income. Indeed, Congress could impose varying income tax rates according to whether the income is derived from a wage in the market or from household services. Because taxing household income is not intended to produce additional revenue, Congress could impose a minimal, flat tax upon household labor.³⁰²

C. THREE HYPOTHETICAL TAXPAYERS

To understand the consequences of taxing women's household labor, we must first estimate the number of hours women work in the home and attach a market value to the labor. In this section, I briefly describe time-use studies that estimate the amount of time women spend on household labor. Using these

300. See *supra* notes 101-13 and accompanying text (explaining how women's household responsibilities prevent attainment of significant social security benefits).

301. Altman, *supra* note 262, at 1427-32 (discussing legislative intent underlying adoption of social security program).

302. If Congress imposes the same marginal tax rate schedule upon household income as that used for earned and unearned income, it could decrease the overall rate structure in light of the revenue potential with a modified tax base that includes household income.

estimates and valuing them at the minimum wage, I then discuss the benefits and burdens taxation will have on three hypothetical taxpayers.³⁰³ By examining hypothetical taxpayers with diverse individual and family characteristics, we can see the potential impact of taxing housework.

Sociological studies indicate the number of hours women spend on domestic tasks (or the level of economic benefits women provide to the home) are tied primarily to three variables: (1) women's marital status; (2) the number of children in the household; and (3) and the level of participation in the waged labor force.³⁰⁴ A time-use study conducted by Beth Anne Shelton illustrates how quantities of household labor vary in relation to these factors. Examining the effects of one characteristic at a time, while holding all other variables constant, Shelton found that marriage increases women's household labor by approximately ten hours per week. While married women perform forty-two hours of household labor per week, single women perform thirty-two hours of such work.³⁰⁵

Shelton also found that the level of household labor increases with the number of children in the home. Women without children work thirty hours in the home, while women with one child work approximately forty-four hours, and women with two children work approximately fifty-one hours per week in the home.³⁰⁶

Finally, Shelton found that the level of women's unwaged labor in the home decreases as the level of market participation increases. Women who stay home or work part-time in the waged labor force perform approximately fifty hours of housework per week, and women working full-time in the waged labor force undertake thirty-five hours of housework every week.³⁰⁷

303. Congress may decide to value the labor using the replacement value method or the opportunity cost method.

304. See, e.g., BETH ANNE SHELTON, *WOMEN, MEN AND TIME* 67-73 (1992) (noting that marital status, employment level, and number of children cause women to perform different levels of household labor); Robinson, *supra* note 221, at 58-59 (providing data indicating housework levels vary with different factors). There are also a number of other variables that might affect time spent on domestic tasks. Nancy Hauserman and Carol Fethke, for example, have noted that a woman's age, education, the size of her house, and the location of her home in an urban or rural setting can all affect the number of hours a woman spends on housework. Nancy R. Hauserman & Carol Fethke, *Valuation of Homemaker's Services*, 22 TRIAL LAW. GUIDE 249, 250-65 (1978) (discussing methods for valuing women's household labor).

Interestingly, while the level of women's household labor changes according to women's lifestyle and family structures, the level of men's household labor remains relatively constant. See SHELTON, *supra* at 62-109.

305. See SHELTON, *supra* note 304, at 67 (providing data on household labor by gender and marital status). Shelton's study, like other sociological studies, however, examines the impact of marriage, children, and labor force participation as single variables. By controlling for individual and household characteristics associated with time spent in the market, these studies fail to examine how women are affected by the presence of multiple factors. For a more precise understanding of women's housework levels, Congress must commission a study investigating the effects upon women's household labor of multiple variables present at one time.

306. See *id.* at 68 (providing data on household labor by gender and number of children).

307. See *id.* at 69 (providing data on household labor by gender and paid labor time). Because the

Based on Shelton's time-use study, we can approximate the number of hours that each hypothetical woman works in the home. For purposes of this discussion, I value benefits of the household labor at the minimum wage level. I do not mean to suggest that Congress should value household labor at such a low amount. I use the minimum wage to demonstrate that even at an artificially low level of valuation, women would have greater economic security than under the current system.

Consider Ellen, Deborah, and Martha, three hypothetical taxpayers:

(1) Ellen is married and has two children. Her husband works full-time in the waged labor force earning \$42,500 per year, while Ellen works part-time in the paid labor force earning \$7500 per year. According to the time-use studies, Ellen undertakes between forty-two and fifty-one hours per week of household labor. If we assume Ellen spends forty-seven hours each week undertaking productive labor in the home and then value Ellen's time at the 1995 minimum wage,³⁰⁸ Ellen increases her family's annual income by approximately \$10,387.

If each family member is responsible for an equal portion of the household income, Ellen, her husband, and two children must each pay an income tax on \$2596 of income. Because most married couples file jointly, Ellen and her husband will most likely aggregate their household income, jointly sharing the income tax burden. Additionally, although each of Ellen's children will theoretically be responsible for paying the tax, in practice, Ellen and her husband will probably bear the additional tax burden.³⁰⁹

bulk of childcare is purchased to enable women to work in the waged labor market, reducing the imputed income from housework when the woman works in the market will prevent the tax fairness problems that could arise if women were required to pay tax on household labor that they do not themselves provide but purchase in the market. In short, reducing imputed income will ensure women do not have the double burden of paying a tax on the labor as well as incurring the costs of hiring childcare. The fairness issue, however, will not be completely eliminated because some women purchase childcare to enable leisure activity. Under the proposed tax structure, therefore, some women will not only incur the cost of the childcare, but will also incur an increased tax burden associated with the imputed income from household services that they have not even performed.

Women who purchase childcare in the market, however, are less likely to suffer a double burden than might appear at first blush. As discussed above, women who are financially able to purchase childcare services continue to perform extensive household tasks themselves. Women must still spend time employing, scheduling, and instructing the hired caregiver. Hiring childcare help, therefore, cannot be assumed to relieve women of their household responsibilities.

Although women continue to perform household tasks despite the purchase of childcare in the market, it is arguable that families purchasing the services will incur a double burden. Women who perform the services themselves or rely on free services through kinship circles will be subject to taxation, while women who purchase the services in the market will be subject to taxation as well as childcare expenses. The childcare provisions found in §§ 21 and 129, however, alleviate some of this burden. By providing a tax credit and a tax deduction for costs incurred in the purchase of childcare, §§ 21 and 129 offset a portion of this burden. Indeed, taxing household income might cause Congress to resolve, once and for all, the debate involving the personal versus business characterization of childcare expenses. Congress could simply allow a complete deduction for all childcare expenses that would correspondingly decrease the taxable income associated with household services.

308. The 1995 minimum wage was \$4.25. 29 U.S.C. § 206 (1994).

309. I.R.C. § 6201(c) (1994).

If Ellen is subject to the fifteen percent payroll tax that self-employed taxpayers must pay, Ellen must also pay \$1558 every year in payroll taxes. According to the Office of the Actuary of the Social Security Administration, Ellen will be entitled to between \$520 and \$860 each month in future social security benefits.³¹⁰ Under the current tax structure, which excludes household income from the calculation of these benefits, Ellen would most likely fail to obtain independent benefits, and would instead be forced to rely on her husband for spousal benefits earned through his market wages.³¹¹

Finally, because Ellen and her spouse's aggregate market income is \$50,000 per year, they would not be entitled to the household income tax credit.

(2) Deborah is a single woman with one child. She works full-time in the paid labor force earning \$30,000 per year. According to the sociological studies, Deborah provides between thirty-two and forty-four hours per week of household labor to her family. If we assume Deborah provides thirty-seven hours of productive labor per week and calculate the value of the services according to 1995 minimum wage, Deborah provides approximately \$8177 of income to her family each year. Although both Deborah and her child will be responsible for an equal portion of the tax liability, in practice, Deborah will most likely pay the tax burden on the \$8177 of household income.

Deborah will also be subject to the fifteen percent payroll tax. Based on imputed income of \$8177, she will incur an additional tax burden of \$1226 each year. Upon retirement and after having paid into the social security program, Deborah will be entitled to social security benefits each month between \$860 and \$1200.³¹²

If Congress adopted a household income tax credit similar to that discussed above, Deborah could offset \$619 of her social security tax while at the same time maintaining full access to benefits upon retirement.

(3) Martha is single with one child. She is unemployed. According to the time-use studies, Martha provides between thirty-two and fifty hours per week of household labor. If we assume Martha provides forty-two hours of labor and calculate it according to minimum wage, Martha's services are worth \$9282 per year. After subtracting the standard deduction³¹³ and the personal dependent exemptions,³¹⁴ Martha has \$882 of income and will owe \$133 in income taxes.

If the value of Martha's labor was incorporated into the social security system, she would owe approximately \$1392 per year in payroll taxes. She would then be entitled to approximately \$520 each month in social security benefits.³¹⁵

310. BASIC FACTS, *supra* note 102, at 9.

311. McCaffery, *supra* note 1, at 996-1001.

312. See BASIC FACTS, *supra* note 102, at 9.

313. I.R.C. § 63(c)(2)(B) (1994).

314. I.R.C. § 151 (1994).

315. This assumes that as her household labor decreases her waged labor will increase to equal approximately \$10,000 per year. See BASIC FACTS, *supra* note 102, at 9.

Under the current tax structure, Martha's household labor does not count towards social security benefits. Consequently, Martha's unemployment could cause her to have benefits far below the \$520 allowed under the proposed system or to be completely without social security or medicare benefits in old age. Taxation in this case could ensure Martha's economic security in old age.

Because Martha has no income from market activities, under the household income tax credit proposed above, her entire social security and income tax would be offset.

CONCLUSION

Scholars in many disciplines have recognized that women suffer economic vulnerability due to the division of labor in the home along gender lines. Because many women undertake the time-consuming tasks of bearing and rearing children, they often are unable to participate in the waged labor force at the same level as men. Tax analysts, noting the manner in which the tax structure reinforces this traditional gendered division of labor, have almost uniformly responded by proposing tax reform intended to encourage women to substitute marketwork for household labor. Many argue that by substituting a traditionally "male" role in the market for the conventional "female" role in the home, women are more likely to reach economic parity with men.

While this market-oriented approach recognizes women's economic vulnerability, it fails to acknowledge that many women who participate fully in the market remain economically vulnerable. This economic vulnerability depends in part on women's continued responsibility for household work even while in the waged labor force. Although some women view this division of labor as oppressive, this view is not universal. Many women welcome household responsibilities and view the labor as an important contribution to the family and to society. Many women, for example, consider nurturing and caring responsibilities in the home as closely tied to the elimination of discrimination and the empowerment of their community.

This article has argued that to improve women's economic security, household work must be recognized as valuable and productive. In particular, I have argued that Congress should value and tax household activities to ensure women have access to social welfare benefits typically tied to waged labor, such as social security, disability, and medicare benefits. Taxation would mark an important step toward the formal recognition of women as important economic and political actors. This reform, together with the market-oriented reform, would go far toward changing society's views of the value of productive activities carried out both in the home and in the market, and more importantly, it would represent a critical step in achieving greater economic security for women.

